Supreme Court, U.S.
FILED
DEC 23 1971
E. ROBERT SEAVER, CLERK

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-83

JOHN A. STRAIT,

Petitioner,

v.

MELVIN R. LAIRD,
Secretary of Defense, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

Washington, D. C. THIEL PRESS 202 393-0625

PETITION FOR CERTIORARI FILED JULY 15, 1971
CERTIORARI GRANTED NOVEMBER 16, 1971

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

LIEUTENANT JOHN A. STRAIT, Petitioner, v. MELVIN R. LAIRD, Secretary of Defense, STANLEY R. RESOR, Secretary of the Army, LIEUTENANT GENERAL STANLEY LARSON, Commanding General, Sixth United States Army, MAJOR GENERAL PHILIP B. DAVIDSON, JR., Commanding General, Fort Ord, California, Respondents.	Civil Action No. C-70-751-LHB

RELEVANT DOCKET ENTRIES

LT. JOHN A. STRAIT VS MELVIN R. LAIRD, Secty of Defense, et al. . .

1970:

Apr. 9	1. Filed complaint & Petn for Writ of H.C., summons issued.
Apr. 9	2. Filed ord for private process (Francis Heisler) as to Larson.
Apr. 9	3. Filed ord for private process (Francis Hesiler) as to Davidson.
Apr. 10	ORD aft hrg, appli. for TRO granted; contd to 4-24-70, 10AM for OSC.
Apr. 10	4. Filed order to show cause, returnable at San Jose, Calif., April 24, 1970 at 10 A.M., etc.

Apr. 23 6. Filed STIP & ORD cont hrg on petnr's OSC to 5-22-70, 10AM.

May 11 8. Filed petnr's FIRST AMENDMENT to petn for writ of HC, issued.

May 27 10. Filed STIP & ORD cont hrg on petnr's OSC to 6-12-70, 10:30 AM.

June 11 12. Filed resps ret on OSC & mo to dismiss, unnoticed.

June 12 ORD aft hrg, application for writ of HC submitted.

June 24 13. Filed ORD cont hrg on petn for writ of HC to 7-24-70, 2:30 PM. (Cys mailed)

July 22 14. Filed resps ret on OSC, mo to strike & to dismiss, mo to vacate TRO& ANS to petn for writ of HC.

July 24 ORD aft hrg, appli for conscientious objector status submitted.

July 28 ORD petnr's appli. for writ of HC denied.

July 31 16. Filed by petnr.; motion for reconsideration and/or for findings of fact & conclusions of law; motion for stay and motion for order shortening time for hearing thereon.

July 31 17. Filed order for stay of execution of order of July 28, 1970, pending hearing & determination of petnr's mo. for reconsideration to be heard on Aug. 4, 1970, 11:00 A.M. (Peckham)

Aug. 4 ORD pltfs mo for reconsideration of ord denying petn for writ of HC denied. TRO extended 10 days to allow petnr to appeal.

Aug 11 20. Filed notice of Appeal by Pltff (Mailed Clerk's Notice of filing appeal)

Aug 17 22. Filed Certified copy of Order from 9th Circ Court of Appeals "The mo for stay & inj pending appeal & the supporting papers having been con-

sidered, it is ordered as follows: 1. The mo for stay & for an inj pending appeal is denied. 2. It is hereby ordered on the court's own mo that the appeal be expedited. 3. Upon representation by petnr that no respondent's transcript will be necessary, it is ordered that the clerk's transcript of the record be filed as promptly as possible. 4. The court directs the following order of briefing: (a) Appellant may have through August 24, 1970 to file his brief. (b) Respondent's may have through Sept 1, 1970 to file an answering brief. (c) Appellant may have through Sept. 7, 1970 to file a reply brief if one is required. (d) The clerk is directed to set the case for argument on the S.F. calendar during the week of Sept. 8, 1970, and notify all ptys.

Aug 19 Made, Mailed Record on Appeal CCA

Aug 31 23. Filed Cross-appeal by resps.

PETITION FOR WRIT OF HABEAS CORPUS; FOR MANDAMUS; FOR INJUNCTION; FOR DECLARATORY RELIEF AND MOTION FOR A TEMPORARY RESTRAINING ORDER

[Filed April 9, 1970]

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA:

Petitioner complains of the Respondents and for a cause of action, says:

I

1. This action is brought under the constitution and the laws of the United States; under the Declaratory Judgment Act (28 USC Sec. 2201-2); under the Injunction Act (28 USC Sec 2282-2284); under the laws pertaining to jurisdiction of the court to issue a writ of habeas corpus (28 USC Sec 2241 (a); and other writs necessary or appropriate in the court's jurisdiction (28 USCA Sec 1651); under 28 USC Sec 1331 (a) et seq. and under the Federal Rules of Civil Procedure.

2. The matter in controversy exceeds the sum or value of $10,000.00, exclusive of interests and costs.

II

3. The jurisdiction of this court is invoked pursuant to the Constitution of the United States, the Amendments thereto and in accordance with the laws referred to under I and particularly under 28 USC Sec 1331 et seq.

III

Petitioner was born in San Francisco, California on June 19, 1943. He graduated from Lowell Public High School in 1961, from the University of California, Davis Campus, in June, 1966, and from Yale Law School in June, 1969. He entered the Reserve Officer Training Corps in September, 1961 and was commissioned as a 2d Lieutenant on June 10, 1966. He obtained a delayed active duty reporting date for attendance at Yale Law School. Petitioner is currently a reservist in the United States Army Control Group, United States Army Reserve Components Personnel Center.

During petitioner's period of study at law school he was assigned to the United States Army Reserve Components Personnel Center at Fort Benjamin Harrison, Indiana, as a reservist. Petitioner, now working for the San Francisco Neighborhood Legal Assistance Foundation and Glide Memorial Church, is currently still assigned to Fort Benjamin Harrison, Indiana. Said assignment has been and is now simply a record-keeping assignment in that petitioner has never been present at Fort Benjamin Harrison. During this period of a delayed active duty reporting date, petitioner is an inactive member of the reserve. During this period he has not been subject to military orders, reserve meetings or summer active duty nor has he been compensated for military service. He has been ordered to active duty on April 13, 1970 at Fort Gordon, Georgia. (See Exhibit A, p. 76.)

IV

On January 20, 1970, petitioner mailed his request for discharge as a conscientious objector pursuant to Army Regulation 135-25, to the Commanding Officer, Officer of Personnel Operations, Fort Benjamin Harrison, Indiana. A copy of said application and supporting documents is attached hereto, marked Exhibit "A", and incorporated herein by reference as though it were set out at length herein.

Said request for discharge describes in great detail the origin and genesis of his beliefs:

> "My early religious training had little effect upon me at that time because my personal life was such that I was afraid to accept it. As an only child in a neighborhood with very few children, I grew up as a lonely bookworm." (Exhibit A, p.8.).

At an early age he discovered that his skill in target shooting was the only vehicle through which he could gain confidence and relate to other peers.

> "Primarily, because of this need to be a team member and enjoy the rewards of team membership, I joined the high school R.O.T.C. at Lowell." (p.9.).

Upon graduation from high school and entrance into college he found that he was confronted with the same problem of acceptance by his peers. He was disoriented and alienated and turned once again to R.O.T.C. However, petitioner states:

> "In the last two years of Davis, most of my insecurities about my personal abilities receded as my personal successes increased." (p. 12).

Upon graduation from Davis with his commission as a reserve officer, he was confident that the institutions which guided him thus far would continue to sustain him.

When he entered law school petitioner was no longer dependent on the institutions which formerly directed his life. He was in a position to take stock of himself in relationship to the world around him and to direct his own life and form his own values. He found law a bitter disillusionment:

> "Instead of a moral system, I found an amoral method of balancing power groups. Questions of individual happiness or even abstract justice were essentially irrelevant to the role of the lawyer."
>
> "The law, I found, was not going to be the source of guidelines for human behavior as I had hoped it would be. This shock forced me to re-examine many of my expectations of moral rectitude in human institutions as they presently existed. I was forced to begin thinking out my life all over again; what I was going to do, what my role would be." (Ex. A, p. 13.).

Petitioner became involved. He tried to direct his life and entered into projects which he felt were positive acts out of his own conscience and not acts directed by some institution or external set of values.

> "During these last two years I have put together the experiences of my life and have finally felt freed of my personal problems to a degree where I could deal with religious and personal obligations at a greater level." (p. 16.).

He turned to the values he received from his father. His father, a professor of Biophysics at the University of California, conceived of God as a unifying force in the universe, an omnipresence in each man and in all men.

> "My father derived his faith in individual men from his conception of unity in man and from his personal experiences in life." (p. 18).

The teachings of his father were difficult for petitioner to accept because he had been too insecure to be able to understand the "benign nature of the Supreme Being." Now he was face-to-face with himself and his new awareness and had to overcome his constitutional reluctance to confront a situation which required an act of conscience.

The experiences of a lifetime, from the lonely needs of an alienated youngster to the mature and successful graduate of a good law school, crystallized his religious beliefs. As petitioner states:

> "The last year of my life has been a stormy period of soul-searching and agonizing, trying to reconcile my beliefs and conscience with my contract with the Army." (p. 19).

Petitioner had never been in a situation where he had to confront the possibility that his individual act of faith could force him to be in conflict with authority figures who had guided him and protected him from having to make a judgment.

The death of Petitioner's cousin, a conscientious objector, broke the spiritual bind and freed him to assert himself. Petitioner's experiences from the first day of law school to hsi graduation culminated in the filing of his application to the Army requesting that he be discharged from the Army because of his religious belief in the sacredness of human life and his resulting conscientious objection to participation in war in any form.

V

Petitioner's application sets forth the nature of his religious beliefs. Petitioner explains that it is his belief that "human life is sacred." He cannot participate in the taking of human life. Petitioner believes in—

> "A supreme Being, a spiritual unity which exists in all men. This Supreme Being is felt by each of us as a drive which forces us out of our individual selves and makes us try to unite with other men in mutual harmony and love. This Supreme Being is manifested in *all* men and in each man. All men have, and each man has, the potential to fulfill the goal of this Supreme Being which would be "heaven on Earth." This would be the highest expression "of human nature. It can only be achieved by men living in total harmony and mutual love. Because this is the goal, the very nature of man, which each of us hopes to attain, it transcends any individual and is the spiritual guideline by which we may achieve fulfillment. This Supreme Being cannot be challenged or destroyed by individual men. It exists independently of any one man and is the sum total of men." (p. 4.).

Petitioner cannot kill because to kill would be a violation of the unity with mankind. It would irrevocably cut him off and place him in "Hell on Earth" because life would have no meaning any more and it would be replaced by absolute cynicism and it would be "existence without hope." He believes that the dictates of the Supreme Being, as he conceives it, would be violated if he killed or participated in the killing which is the ultimate objective of the military mission.

VI

Pursuant to AR 135-25, petitioner was interviewed by Chaplain Ronald W. Burgess who stated that petitioner was "sincere in indicating that his religious beliefs preclude participating in war in any form." He further concluded that petitioner's convictions were "primarily religious in basis and origin." (Chaplain Burgess approved the application. (p. 72.).

Thereafter, petitioner was interviewed by Captain Thomas G. Wallace who is an officer in the grade of 0-3 and knowledgable in the policies and procedures relating to conscientious objection matters. Captain Wallace approved petitioner's application stating that petitioner did not "believe in the traditional God figure, but rather a 'state of existence in the world as a whole, a unity of people throughout the world.'" As explained by the hearing officer:

> "The ultimate goal for Lt. Strait is to 'deal with people as a whole.' Lt. Strait feels that once a person deals with all people as a whole, the resulting unity of this relationship becomes a 'Supreme Being.'" (p. 74).

Captain Wallace was somewhat perturbed about petitioner's political and social activities and whether or not these showed political rather than religious beliefs. However on the inquiry into this subject at length, the hearing officer concluded that petitioner's beliefs were, in fact, religious in nature and sincerely held. (p. 73-75).

VII

The aforementioned hearings with Captain Burgess and Captain Wallace were held pursuant to AR 135-25 which directs that the applicant be afforded these interviews on request from the USARCPC. (See Exhibit A, p. 66). Petitioner's application, filed as a non-unit reservist residing within the jurisdiction of General Philip B. Davidson, Commanding General, Fort Ord, California, was then forwarded through channels to the Commanding Officer, US Army Reserve Components Personnel Center at Fort Benjamin Harrison, Indiana. At Ft. Benjamin Harrison a board of officers was convened and a decision rendered on April 6, 1970. Petitioner was orally informed on April 6, 1970, that the Department of the Army disapproved his claim. Thereafter, on April 7, 1970 petitioner was given the contents of the disapproval through the senatorial office of the Hon. Alan Cranston. The content of the Department of the Army's denial of petitioner's claim was set out in a letter

dated April 7, 1970 from the Department of the Army, Washington, D.C. The content of the letter is as follows:

> "Your request for a discharge based upon conscientious objection has been disapproved. The conscientious objector review board unanimously found that your alleged conscientious objector beliefs are not truly held and are poorly grounded in religious training and beliefs. The board further stated that any objection to war in any form you might truly hold is based on political reasons, sociological experiences, philosophical views, a personal moral code, an objection to a particular war.
>
> "In view of the above, letter order number A-03-601 remains in effect and you are to report to Fort Gordon, Georgia on 13 April 1970.
>
> "By Order of the Secretary of the Army.
>
> "s/ Col. Raymond Vawter
> Corps of Army Engineers
> Chief, Delayed Officer
> Management Division"

VIII

Petitioner submits that denial of his application for discharge as a conscientious objector is completely without basis in fact. Petitioner further submits that he is a true conscientious objector, that he presents more than just a *prima facie* claim, and that he was wrongfully denied classification as a conscientious objector.

Petitioner's request for discharge pursuant to AR 135-35 having been wrongfully denied by respondents, there is no longer any effective administrative remedy available to him. The Department of the Army, having taken final action, now requires him to proceed to report for active duty pursuant to a standing order which existed during the pendency of petitioner's application. Unless this Court acts on petitioner's behalf, he will be compelled by reason of his conscientious objection to participation in war in any form to refuse to report for training. He will thus face a General

Court Martial for violation of Article 90 of the Uniform Code of Military Justice which carries a maximum penalty of five years at hard labor and in addition a dishonorable discharge and forfeiture of all pay and allowances.

When Petitioner shall refuse to comply with the orders requiring him to report for active duty he will be arrested by the area commander which has geographical and personal jurisdiction over petitioner and tried by Court-Martial. While pending Court-Martial, he will probably be put in pre-trial confinement. As a consequence thereof, petitioner requests that this Court act on his behalf and determine his status as a conscientious objector without forcing him to submit to military orders, training and discipline or suffer the inevitable odium of arrest and detention by the military authorities in this jurisdiction.

IX

Petitioner, on advice of counsel has not submitted an application to the Army Board for the Correction of Military Records on the ground that said application presents no effective or substantial remedy in that the Department of the Army has taken the position that its decision is final.

Further, the Solicitor General in *Craycroft v. Farrell*, No. 718 Mis. has taken the position that—

> ". . . proper application of the exhaustion of remedies principle does not mandate application to boards for correction of records of these services."

In the Supreme Court's Per Curiam Decision in *Craycroft v. Farrell* dated March 30, 1970, the court stated:

> "Upon consideration of the suggestion of the Solicitor General and upon an examination of the entire record the petition for a writ of certiorari is granted, the judgment of the United States Court of Appeals is vacated and the case is remanded to that court.
>
> "The Solicitor General conceded that the administrative remedies which the Court of Appeals held should first be exhausted by the petitioner, have either been exhausted or are nonexistent."

Similarly in *Bratcher v. Laird*, No. 1391 Misc. dated March 16, 1970, the court vacated and remanded another case which posed the exhaustion problem sending it back to the Ninth Circuit to see if they wish to adhere to its decision in light of the Solicitor General's position and with the strong suggestion that if the Court of Appeals does not wish to stand by their own position on the exhaustion principle that the case be sent to the District Court.

X

Respondents MELVIN R. LAIRD, The Secretary of Defense; Respondent STANLEY R. RESOR, the Secretary of the Army; respondent Lieutenant General STANLEY LARSON, Commanding General, Sixth U.S. Army; and respondent MAJOR GENERAL PHILIP B. DAVIDSON, JR., Commanding General, Fort Ord, California, are the respective authorities to recommend and who are authorized to act in and who have the authority to convene a court-martial which we expect to try this petitioner when he is compelled for reasons of religious training and belief and his act of conscience emanating therefrom, to refuse to obey any order by military authorities, the carrying out of which is made impossible by petitioner's conscientious objection to participation in military life.

XI

By reason of the facts set forth above, a controversey exists between petitioner and respondents where petitioner asserts that the act of respondents in denying his application for discharge pursuant to AR 135-25 was wrongful and without basis in fact; whereas respondents assert that since the application for discharge was denied that he is required to report for active duty and that he has no remedy for testing respondent's refusal to grant him a discharge.

XII

Petitioner submits that this court has, and ought to take jurisdiction over this controversy between petitioner and respondents because:

(a) Unless this court takes jurisdiction and grants its order to petitioner, he will, because of his religious belief and conscience, be compelled to commit a military offense and therefore he will face a court-martial before obtaining a Federal Court's review of his claim that he is entitled to the granting of his twice-submitted request for discharge under AR 135-25.

(b) The petitioner exhausted all effective and available administrative remedies and he has no further protection except the one herein requested from this Honorable Court.

(c) That petitioner ought not to be compelled to commit a military offense and ought not to be compelled to face the possible punishment of a general court martial having jurisdiction comparable to civilian courts presiding over felony charges because such a procedure would be in violent disregard of the principles set forth by the Supreme Court of the United States in *Dombrowski v. Pfister*, 380 US 479 85A Supreme Court 1116 (1965), as well as other cases which all attempt to eliminate unnecessary procedural obstacles to the exercise of the constitutional rights.

(d) This petitioner, as an in-service Conscientious Objector is entitled to the same judicial review on a habeas corpus proceeding as a civilian registrant whose claim has been denied because both are facing possible illegal restraint and the denial of this petitioner of such a review would be in violation of the equal protection guarantee of the Fifth Amendment to the United States Constitution.

(e) Because the pertinent Army Regulation, AR 135, 25, which prescribes the policies, criteria and procedures governing the disposition of Reserve members of the Army who claim to be conscientious objectors is lacking in the minimum requirements of procedural due process and thus petitioner is and was deprived of his constitutional rights under the Fifth Amendment to the Constitution.

(f) Denial of the petitioner's application was without any basis in fact and was unreasonable, arbitrary and discriminatory and thus a denial of the equal protection of the law.

XIII

The past acts and the threatened action of the respondents are illegal, unlawful and beyond the scope of respondent's authority for the following reasons:

(a) AR 135-25 authorizes and requires respondents to cause the release from military duty of an enlisted man, such as petitioner, who *prima facie* presented a request showing him to be a bonafide Conscientious Objector, which objection is based on religious training and belief.

(b) Title 50 U.S.C. Sec. 4, 5, 6 (j) provides that nothing contained in that Title shall be construed as to require any person to be subject to combatant service in the armed forces of the United States who, by religious training and belief, is conscientiously opposed to participation in war in any form. Plaintiff qualifies under such exemption from military service, and respondent's insistence that he participates and subjects himself to combatant training and service is unlawful.

XIV

Petitioner did and will suffer irreparable injuries because of the unlawful and unconstitutional acts of the respondents and the damages resulting from such injuries are not monetarily compensable and the respondents threaten to continue their unlawful and unconstitutional acts unless they will be restrained by order of this Honorable Court.

XV

Petitioner is entitled to declaratory relief setting forth that he is entitled to be classified I-O pursuant to AR 135-25 and that in accordance with AR 135-25 and the *prima facie* case set forth by him that he is entitled to be discharged and separated from the military service as a Conscientious Objector.

XVI

Petitioner is entitled to a writ of habeas corpus because petitioner is within the custody of the area commanders of US Army, should they wish to order him to stand trial for court-martial and to perform as a member and officer of the United States Army. Petitioner is under the mandate of the Secretary of the Army to report for active duty and is thereby restrained from doing anything other than conforming with the outstanding order of respondent Secretary of the Army.

XVII

Petitioner is entitled to an injunction directed to the respondents, their agents, servants, deputies and all others acting on their behalf, restraining them from giving such orders to the petitioner which are contrary to his religious beliefs and to his conscience as set forth in his application filed under AR 135-25 and further restraining them from ordering petitioner to be tried before a court martial for his conscientious inability to participate in combat training in the armed forces of the United States because of his religious training and beliefs which makes it conscientiously impossible for petitioner to participate in war or in preparation therefor in any form.

XVIII

Petitioner is entitled to a writ of mandamus on the ground that the denial of his claim by respondents was without any authority since it was not founded on any basis in fact. Petitioner is entitled to an order of this court directing respondents to classify him as a conscientious objector and to proceed to separate him from the military service pursuant to Army Regulation 135-25.

WHEREFORE, petitioner prays:

1. That this Court declare that the threatened acts of the respondents and all others acting on their behalf, ordering petitioner to report for active duty or to be tried before a

court-martial for his conscientious inability to participate in war or preparation for war in any manner whatsoever, are illegal;

2. That this Court declare that petitioner is entitled to be separated from military service pursuant to AR 135-25.

3. That respondents MELVIN R. LAIRD, Secretary of Defense; STANLEY R. RESOR, Secretary of the Army; LIEUTENANT GENERAL STANLEY LARSON, Commanding General, Sixth United States Army; MAJOR GENERAL PHILIP B. DAVIDSON, JR., Commanding General, Fort Ord, California, their agents, servants, deputies and employees, and all others acting on their behalf be temporarily enjoined or restrained from requiring petitioner to report for active duty which order is contrary to his conscientious objection to war in any form or from assigning petitioner duties contrary to his beliefs or from depriving this court of jurisdiction pending determination of this proceeding and from commencing or prosecuting any court martial against petitioner for any refusal to act or obey any order which conflicts with petitioner's claim as a conscientious objector;

4. That respondent's MELVIN R. LAIRD, Secretary of Defense; STANLEY R. RESOR, Secretary of the Army; LIEUTENANT GENERAL STANLEY LARSON, Commanding General, Sixth United States Army; MAJOR GENERAL PHILIP B. DAVIDSON, JR., Commanding General, Fort Ord, California; their agents, servants, deputies and employees, and all others acting on their behalf, be permanently enjoined or restrained from assigning petitioner duties contrary to his conscientious objection;

5. That a writ of habeas corpus issue out of this Court to respondents commanding them to have the body of this petitioner before the court and to abide by the further orders of this court;

6. That if this Court finds that petitioner must proceed before the Army Board for the Correction of Military Records, then to hold this action in abeyance and temporarily enjoin respondents as requested in the third prayer;

7. For costs of suit incurred herein and for such other and further relief as the Court deems just.

Dated: April 7, 1970 /s/John A. Strait,
Petitioner

Mrs Schaefer/js/2808

AMAGR-1A Strait, John A. 1st Ind
SSAN 548-64-9018 (3 Feb 70)
SUBJECT: Application for Discharge as a Conscientious Objector

HEADQUARTERS SIXTH UNITED STATES ARMY,
Presidio of San Francisco, California 94129, 9 Feb 1970

TO: Commanding General, US Army Training Center, Infantry and Fort Ord, Fort Ord, California 93941

1. Request the assistance of your Command in processing the application for discharge as a Conscientious Objector of 1LT John A. Strait, SSAN 548-64-9018, MP-USAR, assigned USAR Components Personnel Center, Ft Benjamin Harrison, Indiana 46249. The provisions of AR 135-25 will be followed in processing this application.

2. Upon completion of action, request reports of interviews required, statement of officer (paragraph 7a(2), AR 135-25) and DD Form 1589, be returned to this headquarters, ATTN: AMAGR-1A, together with attached application. Progress reports, requested in paragraph 3, basic letter, will also be forwarded to this headquarters rather than to Fort Harrison.

3. LT Strait is being informed of this referral of his case to your headquarters.

FOR THE COMMANDER:

2 Incl
nc.

H.L. LIGIER
Chief, AG Res Forces Div

Copy furnished:
1LT Strait

CO, USARCPC, ATTN: RCPO-R

U.S. ARMY RESERVE COMPONENTS PERSONNEL CENTER
FORT BENJAMIN HARRISON
INDIANAPOLIS, INDIANA 49249
RCPO-R

RCPO-R 3 February 1970

SUBJECT: Application for Discharge as a Conscientious Objector

1LT John A. Strait, 548 64 9018, MP
24555 South San Luis Avenue
Carmel, California 93921

1. Your request for discharge as a conscientious objector has been received and is being processed as expeditiously as possible.

2. In the event that a determination is not made by your reporting date, 13 April 1970, you will be expected to comply with your active duty orders to report to Fort Gordon, Georgia.

BY ORDER OF THE SECRETARY OF THE ARMY:

1 Incl
Cy ltr to Sixth Army
3 Feb 70

EDWARD C. LEMIUEX
CPT, MSC
Acting Chief, Delayed Officer Management Div
US Army Reserve Components Personnel Center

Copy furnished:
CG, Sixth USA, ATTN: AMAGR-1A

REFERENCE your letter of 1 February 1970, forms are returned for completion in view of above letter from this office.

App. 20

HEADQUARTERS
UNITED STATES ARMY TRAINING CENTER, INFANTRY
AND
Fort Ord, California 93941
Office of the Staff Judge Advocate

18 Feb 70
DATE

CONSCIENTIOUS OBJECTOR'S REQUEST/FOR APPEARANCE

I have been advised that I have the right to appear in person, with counsel retained by me, if desired, before an officer in the grade of 0-3 or higher who is knowledgeable in policies and procedures relating to conscientious objector matters, for the purpose of presenting my application for (discharge) as a conscientious objector. I (request) the opportunity for personal appearance.

I (do) desire to have retained counsel present with me.

/s/John Aurom Strait
Printed Name

/s/John A. Strait
Signature

0548-64-9018 (1st LT)
Grade, SN, SSAN

Having been advised by me of his rights, the above individual personally made the choice indicated in the above statement.

/s/Robert A. Wicker
Printed Name

/s/Robert A. Wicker
Signature

CPT, STA, 237-66-0914
Grade, Branch, SN, SSAN

AMNOR-AGFW Strait, John A. 2d Ind
548-64-9018 (3 Feb 70)
SUBJECT: Application for Discharge as a Conscientious Objector

PERSONNEL ACTIONS BR, AG SECTION, Ft Ord, CA 93941 19 Feb 70

TO: CO, USAH, Mental Hygiene Dept (AMNOR-MED-NP)

1. Attention is invited to Sixth United States Army letter (1st Ind) dated 9 Feb 70.

2. This command has been directed to process the 1-0 application for 1Lt John Straight.

3. Accordingly, please schedule Lt Straight for a psychiatric evaluation in accordance with Ft Ord, Reg 600-4.

/s/ROBERT M. ROSSELLI
2LT, AGC
Asst AG

DEPARTMENT OF PSYCHIATRY
UNITED STATES ARMY HOSPITAL
SPECIALIZED TREATMENT FACILITY
Fort Ord, California 93941

AMNOR-MED-NP 19 February 1970

STATEMENT

RE: STRAIT John A., 1Lt., 548-64-9018

The subject is referred for psychiatric evaluation in conjunction with his application for 1-0 status.

The subject shows no signs of psychiatric disease which would warrant the disposition of his case through other than administrative channels.

/s/Robert J. Riopelle
MAJOR, MC
Psychiatrist

DEPARTMENT OF THE ARMY
U.S. Army Reception Station
Office of the Chaplain
Fort Ord, California 93941

AMNOR-RS-CH 20 February 1970

SUBJECT: Request for 1-0 Classification

Commanding Officer
USAR Components Personnel Center
Fort Benjamin Harrison
Indiana 46249

1. I have interviewed 1Lt John A. Strait, SSAN 057-14-117, in reference to his application for a 1-0 classification.

2. I believe that he is sincere in indicating that his religious beliefs preclude participating in war in any form.

3. I believe that his convictions are primarily religious in basis and origin.

RONALD W. BURGESS
Chaplain (CPT), USA
Reception Station Chaplain

Office of the Staff Judge Advocate

AMNOR-SJA 2 March 1970

SUBJECT: 1LT John Avrom Strait, 548-64-9018

Commanding General
USATC, Infantry and Fort Ord
ATTN: AMNOR-AGFR
Fort Ord, Ca 93941

1. Pursuant to paragraph 7b(3), AR 135-25, 1LT John Avrom Strait personally appeared before me on 20 February 1970 for the purpose of presenting his application for discharge because of his conscientious objection to participation in war in any form (1-0). LT Strait was represented at this hearing by Mr. Richard M. Silver, Attorney at Law, of the firm of Heisler and Stewart, Carmel, California.

2. The following documents were submitted by LT Strait as additional information to be attached to his application: a telegram from William S. Coffin, Jr., Chaplain at Yale University (Incl 1); a letter from the Reverend Eugene J. Boyle, San Francisco, CA (Inc 2); and a letter from Reverend Martin Murdock, Berkeley, CA (Incl 3).

3. LT Strait is a single male, aged 26. His educational background consists of a B.A. Degree in History from the University of California at Davis, and an L.L.B. in Law from Yale University. LT Strait completed R.O.T.C. at University of California at Davis, and was commissioned into the Military Police Corps in June 1966. He was then placed on a delay reserve status to attend law school. He has completed law school and has received orders to report to Fort Gordon, Georgia for entrance on active duty on 16 April 1970. LT Strait has submitted this application requesting assignment to the Selective Service Civilian Work Program in lieu of entering active duty in the Army.

4. LT Strait is not a member of a church. He is affiliated with the Glide Memorial Church in San Francisco, a Methodist Church. LT Strait is not a member of the Methodist faith, but rather just likes this particular church. LT Strait stated that he doesn't believe in the traditional God figure, but rather a "state of existence in the world as a whole, a unity of people throughout the world." The group experience which results from this unity of people is "the Supreme Being" as set forth by LT Strait. LT Strait believes that the primary force operating against the Supreme Being is the inability of people to know themselves. He stated that you must not label people with names such as "nigger" but you must look to the underlying human qualities. One must understand oneself and try to extend oneself across different social barriers and the lack of communication surrounding these barriers. The ultimate goal for LT Strait is "to deal with all people as a whole." LT Strait feels that once a person deals with all people as a whole, the resulting unity of this relationship becomes "a Supreme Being." He stated that violence cannot be used to try and destroy people because of personal or racial prejudice. He is totally dedicated to non-violence, and says that violence will never work. LT Strait says that he can never participate in the Army, not even as a 1-A-0, because "the mission of the Army is to carry out the nation's policy, and specifically to kill the enemy." He stated he cannot tolerate this method of dealing with people.

5. During his matriculation at the Yale University School of Law, LT Strait became very active in political and pacifist activities. He was a member of the Law Students' Civil Rights Research Council Chapter at Yale, was active in legal seminars on the draft and conscientious objection, participated in non-violent demonstrations against the draft, was one of a group of Yale law students who participated in Negro voter registration in Mississippi, worked in the McCarthy Campaign for President as an anti-war campaigner, and worked for the United States Commission on Civil Rights in Alabama and the Southwestern

United States. All of these activities tend to show political rather than religious beliefs, and I asked LT Strait if his beliefs were not essentially political rather than religious. Lt Strait stated that his beliefs "center around man." All religion is based on man, and cannot be divorced from dealings with man. LT Strait stated that he finds his "Supreme Being in man." Based upon LT Strait's stated beliefs, and the sincerity with which he appeared to hold these beliefs, it is my determination that LT Strait's beliefs fall within a *very liberal* interpretation of the case of *United States v. Seeger*, 85 S.Ct. 850 (1965).

6. LT Strait stated that his beliefs as they now exist became fixed during his second year of law school. He had been examining his life for a long time, and finally decided that he could not participate in the Army. It is my opinion that LT Strait's beliefs are sincerely held. The letters of support and recommendation attached to LT Strait's application are unquestionable, and all support LT Strait's position. LT Strait has in his application expressed his willingness to perform work under the Selective Service Civilian Work Program for Conscientious Objectors if he is discharged as a conscientious objector. I do not think that LT Strait is attempting by this application to avoid service to his country. I therefore recommend approval of this application, and strongly urge that LT Strait be required to perform alternate Selective Service civilian work as a conscientious objector.

THOMAS G. WALLACE
CPT, JAGC.
Hearing Officer

Cy furn:
1LT John A. Strait, 548-64-9018
24555 South San Luis Avenue
Carmel, CA 93921
Heisler & Stewart
Attorneys at Law
ATTN: Mr. Silver
P.O. Drawer 3996
Carmel, CA 93921

DEPARTMENT OF THE ARMY
OFFICE OF PERSONNEL OPERATIONS
Fort Benjamin Harrison, Indiana 46249

RCPA-P 5 March 1970
LETTER ORDERS NUMBER A-03-101
SUBJECT: Branch Relief and Active Duty

JOHN A. STRAIT
204 Grand View Ave.
San Francisco, Calif. 94114

548-64-9018, 1LT MPC-USAR
MOS: 0005 9110 USAR Control Group (CADO), USARCPC, Ft. Benjamin Harrison, Ind. 46249

TC 452. Following BRANCH RELIEF directed:
Authority: AR 140-10
Relieved from: JAGC
Effective date: 5 March 1970

TC 112. The above named individual is, with his/her consent, ordered to ACTIVE DUTY in the grade held as a reserve officer of the Army. Individual is assigned as indicated and will proceed from his current location in sufficient time to report as indicated on the date specified.

ADMINISTRATIVE ACCOUNTING DATA
Auth: Title 10, U.S. Code, subsection 672(d)
Aloc: 05-R 3395
HOR; Same as SNL address
PL EAD/OAD: Same as SNL address
PPN: S5
Component: USAR
Sex: Male
Acct Clas: 2102020 32-28 P2110-21 S99999
PCS MDC: 1A00 1A01
Asg to Act dy Access Det: Fifth U.S. Army, Fort Sheridan, Illinois 60037
Eff date (Act dy Access Det): 11 April 1970

FOR THE INDIVIDUAL

Effective date of active duty: To be determined at first duty station.

Active duty commitment: Obligated volunteer officer 2 years

Temporary duty enroute at: U.S. Army Military Police School (3AW2MHAA00), Fort Gordon, Georgia 30905

Reporting date (TDY station): 13 April 1970

Period of temporary duty: Approximately 9 weeks

Purpose of temporary duty: Military Police Officer Basic Course Class number 6

Assigned to: USAG, (WOU3-AA), Fort Bragg, North Carolina 28307

Reporting date: 3 July 1970

Leave data: 15 DDALV upon completion of TDY

Availability date: NA

Port call data: NA

Special Instructions: Comply with the following numbered items of DA Supplemental instructions (Appendix B, AR 310-10): 1, 2, 16, 39, 51, 79, 81, 82

Quota source 88B provided by USARCPC.

Individual is relieved from USAR Control Group (OADO), USARCPC, on the effective date of active duty.

Officer will undergo physical examination within 5 days after reporting for duty.

BY ORDER OF THE SECRETARY OF THE ARMY:

/s/P. R. FERGUSON
[for] H. W. WHEELER
LTC, USA
Chief, Personnel Actions Division

DISTRIBUTION:
50 Officer Concerned

10 Officer DA Form 201
6 CC, Fifth U.S. Army, ATTN: ALFAC-CP (For MR and Other Admin Purposes)
2 Dir, OPD, OPO (OPMP)
10 OPO, RCPC, ATTN: RCPA-P
3 OPO, RCPC, ATTN: RCPO
2 CG, Third U.S. Army
5 Comdt, USAMPS, Ft Gordon, GA 30905 (For MR and Other Admin Purposes)
5 CO, USAG, Ft Bragg, NC (For MR and Other Admin Purposes)
1 Installation PO, Ft. Bragg, NC

[Filed April 10, 1970]

ORDER TO SHOW CAUSE

Good cause appearing upon reading the petition on file herein, it is

ORDERED, That MELVIN R. LAIRD, Secretary of Defense, STANLEY R. RESOR, Secretary of the Army, LIEUTENANT GENERAL STANLEY LARSON, Commanding General, Sixth United States Army, MAJOR GENERAL PHILIP B. DAVIDSON, JR., Commainding General, Fort Ord, California, appear before this court at San Jose, California, on the 24th day of April 1970, at the hour of 10 a.m. of this day to show cause, if any they have, why a writ of habeas corpus should not issue herein as prayed for and that a copy of this Order be served upon them.

It is further ordered that the petitioner remain within the jurisdiction of this Court, that he not be assigned duties inconsistent with the provisions of AR 135-25.

San Francisco, California, this 10th day of April 1970.

/s/Robert H. Peckham
Judge of the United States
District Court

RETURN ON SERVICE OF WRIT

United States of America

NORTHERN DISTRICT OF CALIFORNIA

CIVIL

_____ Clerk's No. C-70-751

vs.

_____ U.S. Marshal's No. _____

SERVICE COMPLETED or ENDEAVOR TO SERVE

I hereby certify and return that I endeavored to serve & ORDER TO SHOW CAUSE served the annexed SUMMONS & COMPLAINT (Writs) on the therein-named LIEUTENANT GENERAL STANLEY LARSON (Name of individual, company, corporation, etc.)

by handing to and leaving a true and correct copy thereof with (if endeavor—describe what was done in endeavoring to serve) Lt. Col Ann Wansly, Ass't SJA, accepted on the (Name of individual or agent of company, corporation, etc.)

Behalf of General Larson

personally at (if endeavor—show addresses where endeavors made) _____

Presidio of San Francisco Bldg 39 (Address—Street number, apartment number, rural route, etc.)

San Francisco (City) California (State) in the said District

at 9:30 a.m.-p.m., on the 13th day of April, 19 70

SERVICE NOT COMPLETED

Date _____

I hereby certify and return, that on the _____ day of _____, 19____,

I received the within _____ and that after

diligent search, I am unable to find the within named _____

_____, within said district.

Marshal's fees 6.00

Mileage .96

GEORGE E. TOBIN
United States Marshal.

By Harry T. Hudson
Harry T. Hudson *Deputy.*

RETURN ON SERVICE OF WRIT

United States of America

Northern DISTRICT OF California

..... Clerk's No. C 70 751

vs.

..... U.S. Marshal's No. .....

SERVICE COMPLETED or ENDEAVOR TO SERVE

I hereby certify and return that I ~~endeavored to serve~~ served the annexed Success Order S/C and Summons (Writ)

on the therein-named United States of America, Secretary of Defence, and Secre-
(Name of individual, company, corporation, etc.)
-tary of the Army

by handing to and leaving a true and correct copy thereof with (~~if endeavoring to serve~~) William Spohn, Assn't U.S. Attny, and by sending by certified mail # 803958 2 copies to the Attorney General, WASH D C (Name of individual, company, corporation, etc.) and certified mail # 803960, one copy to Melvin Laird, Secre of Defence, and by certified mail # 803959 to Stanley R. Resor, Secretary of the Army.

personally at (if endeavor, show address where endeavor made) .....

450 Golden Gate Ave.
(Address—Street number, apartment number, rural route, etc.)

San Francisco (City) California (State) in the said District

at 10:00 a.m. ~~p.m.~~, on the 13th day of April, 19 70.

SERVICE NOT COMPLETED

Date .....

I hereby certify and return, that on the ..... day of ....., 19....,

I received the within ..... and that after

diligent search, I am unable to find the within named .....

..... within said district.

Marshal's fees $ 16.00 cp

Mileage .....

George E. Tobin
United States Marshal

By ..... Deputy.
Gary C. Brickey

FIRST AMENDMENT TO PETITION FOR WRIT OF HABEAS CORPUS; FOR INJUNCTION; FOR DECLARATORY RELIEF

[Filed May 11, 1970]

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA:

Petitioner complains of the respondents and makes the following allegations in amendment to his previously filed petition in the above-entitled action, pursuant to Rule 15 (a) of the Federal Rules of Civil Procedure:

I.

Paragraph I, appearing on page 1 of the original petition, is amended to read as follows:

"I

"1) This action arises under the Constitution of the United States, Article III, Section 2, the First, Fifth and Fourteenth Amendments to the Constitution of the United States; under the Declaratory Judgment Act (28 U.S.C. Sections 2201 and 2202); under the Injunction Act (28 U.S.C. Sections 2282-2284); under the laws pertaining to jurisdiction of the Court to issue a writ of habeas corpus (28 U.S.A. Section 2241(a); under the laws pertaining to an action in the nature of mandamus (28 U.S.C. Section 1361); under the Administrative Procedure Act (5 U.S.C. Sections 701-703, *et seq.*); under the laws pertaining to jurisdiction for adjudication of a federal question (28 U.S.C. Section 1331(a), *et seq.*); and other writs necessary or appropriate in aid of the Court's jurisdiction (28 U.S.C. Section 1651); and under the Federal Rules of Civil Procedure.

"2) The matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs."

II.

Paragraph II, appearing on pages 1 and 2 of the original petition, is amended to read as follows:

"II

"3) The jurisdiction of this Court is invoked pursuant to the Constitution and the laws of the United States as set forth in Paragraph I, above.

Petitioner has at all times maintained as his permanent domicile, the City and County of San Francisco, California. Petitioner pays his taxes in San Francisco, has his bank account and credit accounts in San Francisco, has his draft board in San Francisco, and all significant contacts have been and remain in San Francisco, California.

Petitioner has at all times pertinent herein been subject to the orders of respondent COLONEL JOHN HOFFMAN, Commanding Officer, United States Army Reserve, Components Personnel Center, Fort Benjamin Harrison, Indiana. Pursuant to the orders of said respondent, petitioner has had permission to reside in San Francisco, has received orders for physical examination in San Francisco, has been interviewed pursuant to the procedures set forth in AR 135-25 in Fort Ord, California, has received travel vouchers from San Francisco pursuant to orders, and has been permitted to delay his active duty in order to take the California Bar Examination which was taken in August, 1969, without success. (Petitioner has rescheduled himself for the August, 1970 Bar Examination in San Francisco, California.)

Petitioner is subject to the orders of said respondent COLONEL JOHN H. HOFFMAN in the jurisdiction of this Court. Attached hereto and incorporated herein as though fully set out is the Affidavit of Peter Haas, Staff Assistant in the offices of the Honorable Alan Cranston, United States Senator. Said affidavit is marked Exhibit "A," pages 78-80. Said affidavit shows that prior to the time respondent COLONEL HOFFMAN received notice of the pending litigation, petitioner was considered Absent Without Leave, and that he was subject to arrest by the Military Police as a deserter. However, after receipt of notice, petitioner was no longer considered AWOL and "new orders would have to be cut."

Attached hereto and incorporated herein as though fully set out is a copy of certain orders from the Office of Personnel Operations, Fort Benjamin Harrison, Indiana, and dated 17 April 1970. Said orders are marked Exhibit "A", pages 81-83. Said orders are new orders cut to conform with the pending litigation. Petitioner has been further informed by telephonic transmittal of a telegram that new orders have been cut to conform to the new hearing date of petitioner's request for relief. (See Exhibit "A," page 83.)"

III.

Paragraph X, appearing on page 8 of the original petition, is amended to read as follows:

"X

"Respondents MELVIN R. LAIRD, the Secretary of Defense; respondent STANLEY R. RESOR, the Secretary of the Army; respondent LIEUTENANT GENERAL STANLEY LARSON, Commanding General, Sixth United States Army; respondent MAJOR GENERAL PHILIP B. DAVIDSON, JR., Commanding General, Fort Ord, California; and respondent COLONEL JOHN H. HOFFMAN, Commanding Officer, United States Army Reserve, Components Personnel Center, Fort Benjamin Harrison, Indiana, are the respective authorities who are unlawfully restraining the liberty of petitioner and should be required to discharge petitioner as a conscientious objector pursuant to AR 135-25. Further, said respondents are the respective authorities to recommend and who are authorized to act to convene a Court-Martial to try petitioner for refusing to report to active duty should petitioner refuse to report because of his conscientious objection to participation in war in any form."

IV.

Paragraph XI, appearing on page 8 of the original petition, is amended to read as follows:

"XI

"By reason of the facts set forth above and respondents' threatened acts and failure to discharge petitioner as a conscientious objector, a substantial Federal Question arises under the United States Constitution and the laws of the United States in that unless respondents are restrained and directed to discharge petitioner pursuant to AR 135-25 as a conscientious objector, petitioner's right to due process of law under the Fourteenth and Fifth Amendments to the United States Constitution will be unlawfully abridged, petitioner's right to the free exercise of his religion under the First Amendment to the United States Constitution will be unlawfully abridged, and petitioner's right to equal protection of the law will be violated.

Further, by reason of the facts set forth above and respondents' failure to discharge petitioner as a conscientious objector, they have failed to fulfill a plainly prescribed ministerial duty in discharging petitioner pursuant to Army Regulation 135-25 (see Exhibit "A", pages 84-89). The act of respondents in failing to discharge him as a conscientious objector is arbitrary and capricious and wholly without any basis in fact or law.

Further, respondents have failed to follow the basic guidelines of AR 15-6 in convening a board of officers to review petitioner's application for discharge. Said respondents failed to convene a Board with a quorum, did not permit petitioner to challenge any member of the Board, did not permit petitioner to present witnesses on his own behalf, did not permit petitioner to have civilian counsel present at all open sessions of said Board, and did not permit petitioner to rebut adverse allegations. Respondents have thus completely ignored the plain directives of

AR 15-6 and should be compelled to convene the Board pursuant to respondents' own regulation. (See Exhibit "A," pages 90-101, and 102-110.)

Further, petitioner seeks a declaratory judgment pursuant to the Declaratory Judgment Act (28 U.S.C. 2201 and 2202) on the basis of the Administrative Procedure Act (5 U.S.C. Sections 701-703, *et seq.*) to declare that petitioner is entitled to a discharge pursuant to AR 135-25 and to declare that respondents failed to follow their own regulations regarding the processing of his request for discharge, thereby denying petitioner due process of law. Petitioner seeks a further declaration that the respondents be restrained until they are made to comply with their own regulations in processing petitioner for discharge as a conscientious objector."

V.

Paragraph XII, subparagraph a), appearing on page 9 at line 4 of the original petition, is amended to read as follows:

". . . entitled to the granting of his request for discharge under . . . "

VI.

Paragraph XVII, subparagraph 3), appearing on pages 11 and 12 at lines 27-32 of the original petition, is amended to read as follows:

"3) That respondents MELVIN R. LAIRD, Secretary of Defense; STANLEY R. RESOR, Secretary of the Army; LIEUTENANT GENERAL STANLEY LARSON, Commanding General, Sixth United States Army; MAJOR GENERAL PHILIP B. DAVIDSON, JR., Commanding General, Fort Ord, California; and COLONEL JOHN H. HOFFMAN, Commanding Officer, United States Army Reserve, Components Personnel Center, Fort Benjamin Harrison, Indiana, their agents, servants, deputies and employees, and all others acting on their behalf be temporarily enjoined

or restrained from requiring petitioner to report for active duty which order is . . ."

VII.

Paragraph XVIII, subparagraph 4), appearing on page 12 of the original petition, is amended to read as follows:

"4). That respondents MELVIN R. LAIRD, Secretary of Defense; STANLEY R. RESOR, Secretary of the Army; LIEUTENANT GENERAL STANLEY LARSON, Commanding General, Sixth United States Army; MAJOR GENERAL PHILIP B. DAVIDSON, JR., Commanding General, Fort Ord, California; COLONEL JOHN H. HOFFMAN, Commanding Officer, United States Army Reserve, Components Personnel Center, Fort Benjamin Harrison, Indiana, their agents, servants, deputies and employees, and all others acting on their behalf, be permanently enjoined or restrained from assigning petitioner duties contrary to his conscientious objection;"

DATED: May 7, 1970.

HEISLER & STEWART
Attorneys for Petitioner
Herbert A. Schwartz

Exhibits

WU TELTEX SFO 1970 APR 28
MCLELANAFB SAC 4:25 PM

TLX19 GOVT PD
VIA MCCLELLAN AFB CALIF 28 APR
1LT JOHN A. STRAIT
204 GRAND VIEW AVE SFRAN
ACTION COPY TO ADDEE INFO COPY TO US ARMY MILITARY POLICE SCHOOL FT FXXX GORDON GA ACT BY ACCESS DET FIFTH US ARMY FT SHERIDAN IL
CPO-R
SUBJ: CHANGE IN REPORTING DATE
YOUR ACTIVE DUTY REPORTING DATE OF 27 APRIL 1970 HAS BEEN RESCHEDULED TO 25 MAY 1970. AMENDATORY ORDERS WILL FOLLOW UNDER SEPARATE COVER
DA OPO USARCPC FT BENJAMIN HARISON IN
325P PST

DEPARTMENT OF THE ARMY
U.S. ARMY RESERVE COMPONENTS PERSONNEL CENTER
FORT BENJAMIN HARRISON
INDIANAPOLIS, INDIANA 46249

RCPA 7 April 1970

MEMORANDUM FOR RECORD

SUBJECT: CONSCIENTIOUS OBJECTOR REVIEW BOARD RECORD OF PROCEEDINGS

1. Pursuant to letter, Headquarters, Department of the Army, RCPC, dated 27 March 1970 subject: "Conscientious Objector Review Board," a board of officers was convened at 0845 hours 27 March 1970 at Fort Benjamin Harrison, Indiana. The Board met to review and make recommendations on the application for a conscientious objector discharge (AR 635-25) of 1LT John A. Strait, 548-64-9018.

2. The following members of the Board were present:

WHEELER, HAROLD W., SSAN 506-14-8737, LTC, AGC (PRESIDENT)
GIESE, WILLIAM, SSAN 395-30-8318, LTC, INF
COFFEE, CHARLES W., SSAN 304-36-4633, MAJ, INF (RECORDER w/o vote)
BOLTON, PAUL J., SSAN 039-22-1888, CPT, CH

3. The following members of the Board were absent with the concurrence of the President and convening authority:

BALLINGER, MALCOLM B., SSAN 022-01-5227, LTC, CH
DOUGLAS, LAWRENCE W., SSAN 361-26-7130, LTC, INF
VAWTER, RAYMOND M., SSAN 511-22-8492, LTC, EN
WALLACE, FESTUS E., SSAN 283-26-1390, LTC, FA
CAYLOR, HOWARD W., SSAN 467-09-8519, MAJ, MSC
WEAVER, BYRON E., SSAN 307-32-4089, MAJ, AGC
ZACHARIAS, H.J., SSAN 446-22-0753, MAJ, INF
COLOGNE, KNOX M. III, SSAN 564-60-3975, CPT, JAGC (Advisory w/o vote)

LEMIEUX, EDWARD C., SSAN 024-32-4271, CPT, MSC
PARK, RALPH J., SSAN 405-32-7056, CPT, CH
WILSON, JEFFREY W., SSAN 395-38-2378, CPT, MC
(Advisory w/o vote)
STEVENS, HERSCHELL L.F., SSAN 447-14-8065, CW4, AUS

4. The Board members were polled to determine if any member had prior knowledge of this case that would prejudice his ability to render a fair and impartial decision. This poll revealed that no member of the quorum had any prior knowledge of the case.

5. Exhibits:

A - Copy of the Board Appointing Order.
B - Copy of Applicant's Request for Discharge.
C - Copy of Interviewing Medical Officer's Statement.
D - Copy of Interviewing Chaplain's Statement.
E - Copy of Hearing Officer's Statement.

6. Findings: Having carefully considered the facts and documents submitted by 1LT John A. Strait, 548-64-9018, incidental to his request for discharge as a conscientious objector (1-0) the Board finds: that the documentation submitted fails to qualify the applicant as a conscientious objector (classification I-0).

a. In reviewing this application, the Board considered every aspect of LT Strait's written application; letters from interested parties presented in support of his claim; and the opinions expressed by the Chief, Delayed Officer Management Division, interviewing Chaplain, Hearing Officer, and Military Medical Officer.

b. The Board unanimously believed that LT Strait's alleged conscientious objector beliefs are not truly held; are poorly grounded in religious training and belief; and any objection to war in any form he might truly hold is based solely on political reasons, sociological experiences, philosophical views, a personal moral code, and objection to a particular war. In accordance with paragraph 5c, AR 135-25, the latter 5 reasons are grounds for disqualification

of a conscientious objector application if such reasons constitute the sole basis for the conscientious objector claim. The Board's denial recommendation is based on, but not limited to, the following points:

(1) MPRJ (DA Form 201) -

(a) On 20 August 1968, petitioner requested that his delay status be extended until 1 January 1970 for the purpose of taking the California Bar examination, and qualifying for a Judge Advocate General commission. No mention was made of any conscientious objector beliefs.

(b) On 15 February 1969, he returned a form Certification of Medical Fitness indicating he was physically qualified for military service. Again, no mention of any conscientious objector beliefs.

(c) On 7 June 1969, LT Strait was promoted to First Lieutenant, USAR. He accepted this promotion without any apparent reservation, and again made no mention of his purported conscientious objector beliefs.

(d) On 1 October 1969, LT Strait called in to this Center and requested rescheduling of his active duty commencement date in order to take the bar examination. The above points are presented in correlation with the fact that he implies throughout his application that his beliefs have developed over the past 3 years. He further mentions to the Hearing Officer that his beliefs became fixed during his second year of law school, yet does not once mention these alleged beliefs until after he received his initial active duty alert letters. The Board unanimously believed that LT Strait is either a skillful opportunist, that his beliefs are not the burning issue he would have the Board accept, or both.

* * * * *

7. Recommendation(s): In view of the above findings, the Board recommends disapproval of LT Strait's request for discharge as a conscientious objector.

8. The Board adjourned at 1415 hours 3 April 1970.

5 Incls
as

/s/Harold W. Wheeler
HAROLD W. WHEELER, LTC
(PRESIDENT)

/s/Charles W. Coffee
CHARLES W. COFFEE, MAJ
(RECORDER)

9. Dissenting Vote(s): None

10. Action by Convening Authority: The recommendation of the Board is approved.

BY ORDER OF THE SECRETARY OF THE ARMY:

Distribution:
Original - TAG File.
Copy - Field 201 File.
Copy - USARCPC File.

/s/John H. Hoffman
JOHN H. HOFFMAN
Colonel, ADA
Commanding

App. 44

DEPARTMENT OF THE ARMY
OFFICE OF PERSONNEL OPERATIONS
Fort Benjamin Harrison, Indiana 46249

/11j

RCPA-P 17 April 1970

LETTER ORDERS NUMBER A-04-430

SUBJECT: Branch Relief and Active Duty

JOHN A. STRAIT
204 Grand View Avenue
San Francisco, Calif. 94114

548 64 9018 1LT MPC-USAR MOS: 0005 9110 USAR Control Group (OADO), USARCPC, Fort Benjamin Harrison, Indiana 46249

TC 452. Following BRANCH RELIEF directed:
Authority: AR 140-10
Relieved from: JAGC
Effective date: 17 April 1970

TC 112. The above individual is, with his/her consent, ordered to ACTIVE DUTY in the grade held as a reserve officer of the Army. Individual is assigned as indicated and will proceed from his current location in sufficient time to report as indicated on the date specified.

ADMINISTRATIVE ACCOUNTING DATA
Auth: Title 10, U.S. Code, subsection 672(d)
Aloc: 05-R-3395
HOR: Same as SNL
PL EAD/QAD: Same as SNL
PPN: S5
Component: USAR
Sex: Male
PCS MDC: 1A00
Asg to Act dy Access Det: Fifth U.S. Army, Fort Sheridan, Illin[illegible] 0037
Eff date (Act dy Access Det): 25 A[illegible] 1970

FOR THE INDIVIDUAL
Effective date of active duty: To be determined at first duty station.
Active duty commitment: Obligated volunteer officer 2 years

Assigned to: U.S. Army Military Police School
(3AW2MHAA00) Fort Gordon, Georgia 30905
Reporting date: 27 April 1970
Leave data: NA
Availability date: NA
Port call data: NA
Special Instructions: Comply with the following numbered items of DA Supplemental instructions (Appendix B, AR 310-10): 1, 2, 16, 39, 51, 79, 81, 82, 32
Individual is relieved from USAR Control Group (OADO), USARCPC, on the effective date of active duty. Officer will be utilized by CG Ft. Gordon in duties as deemed fit until next school class begins. Officer will undergo physical examination within 5 days after reporting for duty.

BY ORDER OF THE SECRETARY OF THE ARMY:

/s/P. R. Ferguson
for H.W. WHEELER
LTC, USA
Chief, Personnel Actions
Division

DISTRIBUTION:
50 Officer Concerned
6 CG, Fifth USA ATTN: ALFAG-CP (For MR and other Admin Purposes)
10 OPO, RCPC, ATTN: RCPA-P
2 CG, Third U.S. Army
15 CO, USAMPS Ft Gordon GA 30905 (For MR and Other Admin Purposes)
1 Instl PO Ft Gordon GA
2 Dir, OPD, OPO (OPMP)
10 Officer DA Form 201
3 OPO, RCPC, ATTN: RCPO

App. 46

DEPARTMENT OF THE ARMY
OFFICE OF PERSONNEL OPERATIONS
FORT BENJAMIN HARRISON, INDIANA 46249

/llj

RCPA-P
LETTER ORDERS NUMBER A-04-404 17 April 1970

SUBJECT: Revocation

JOHN A. STRAIT 548 64 9018 1LT MPC-USAR MOS:
204 Grand View Avenue 0005 9110
San Francisco, Calif. 94114

TC 469. Following orders are changed as indicated.

Action: Revocation

So much of: DA RCPA-P Letter Orders Number A-03-101, OPO, dated 5 March 1970, Subject: Branch Relief and Active Duty

Pertaining to: JOHN A. STRAIT 548 64 9018 1LT MPC-USAR MOS: 0005 9110

As reads: NA

How changed: NA

Authority: Paragraph 1-17c, AR 310-10.

BY ORDER OF THE SECRETARY OF THE ARMY:

/s/P. R. Ferguson
for H. W. WHEELER
LTC, USA
Chief Personnel Actions
Division

DISTRIBUTION:
15 Officer Concerned
6 CG, Fifth USA Attn:
ALFAG-CP

10 OPO, RCPC, ATTN: RCPA-P
2 Dir, ORD, OPO (OPMP)
3 OPO, RCPC, ATTN: RCPO
10 Officer DA Form 201
2 Third USA
5 Comdt, USAMPS Ft Gordon, GA 30905
5 CO, USAG, Ft Bragg, NC
1 Instl PO Ft Bragg, NC
OPO, RCPC FL 70 (REVISED)
1 NOV 69

DEPARTMENT OF THE ARMY
OFFICE OF PERSONNEL OPERATIONS
FORT BENJAMIN HARRISON, INDIANA 46249

/llj

RCPA-P
LETTER ORDERS NUMBER A-04-892 29 April 1970

SUBJECT: Amendment

JOHN A. STRAIT 548 64 9018 1LT MPC-USAR MOS:
204 Grand View Avenue 0005 9110
San Francisco, Calif. 94114

TC 469. Following orders are changed as indicated.

Action: Amendment

So much of: RCPA-P Letter Orders Number A-04-430, OPO, dated 17 April 1970, Subject: Branch Relief and Active Duty.

Pertaining to: JOHN A. STRAIT 548 64 9018 1LT MPC-USAR MOS: 0005 9110

As reads: Eff date (Act dy Access Det): 25 April 1970 Reporting date: 27 April 1970

How changed: LATR: Eff date (Act dy Access Det): 23 May 1970 Reporting date: 25 May 1970

Authority: Paragraph 1-17c, AR 310-10.

BY ORDER OF THE SECRETARY OF THE ARMY:

/s/P. R. Ferguson
for H. W. WHEELER
LTC, USA
Chief, Personnel
Actions Division

DISTRIBUTION:
15 Officer Concerned
6 CG, Fifth USA Attn: ALFAG-CP
10 OPO, RCPC, ATTN: RCPA-P
2 CG, Third USA
5 CO USAMPS Ft Gordon GA 30905
1 Instl PO Ft Gordon GA
2 Dir, OPD, OPO (OPMP)
10 Officer DA Form 201
3 OPO, RCPC, ATTN: RCPO

OPO, RCPC FL 70 (REVISED)
1 NOV 69

RETURN ON SERVICE OF WRIT

United States of America

Northern DISTRICT OF California

_____ Clerk's No. C-70-751

vs.

_____ U.S. Marshal's No. _____

SERVICE COMPLETED or ENDEAVOR TO SERVE

I hereby certify and return that I ~~endeavored to serve~~ served the annexed Summons (Writ)

on the therein-named Colonel John H. Hoffman Commanding Officer Fort Benjamin (Name of individual, company, corporation, etc.)

Harrison, Indiana

by handing to and leaving a true and correct copy thereof ~~with (name of person endeavoring to serve)~~ together with copy of complaint

~~by (name of person endeavoring to serve)~~ by certified mail # 220942 (Name of individual or agent of company, corporation, etc.)

personally at (if endeavor—show addresses where endeavors made) _____

150 Golden Gate Ave., San Francisco, California (Address—Street number, apartment number, rural route, etc.)

_____ (City) _____ (State) in the said District

at 9:00 a.m.~~p.m.~~, on the 12th day of May, 19 70.

SERVICE NOT COMPLETED

Date _____

I hereby certify and return, that on the _____ day of _____, 19____,

I received the within _____ and that after

diligent search, I am unable to find the within named _____

_____ within said district.

Marshal's fees $4.00

Mileage 0

George E. Tobin
United States Marshal.

By _____
Lester C. Young Deputy.

RETURN ON SERVICE OF WRIT

United States of America

Northern DISTRICT OF California

_____ Clerk's No. C-70-752

vs.

_____ U.S. Marshal's No. _____

SERVICE COMPLETED or ENDEAVOR TO SERVE

I hereby certify and return that I ~~endeavored to serve~~ served the annexed Summons (Writ) on the therein-named U.S.A. (Name of individual, company, corporation, etc.)

by handing to and leaving a true and correct copy thereof together with copy of complaint ~~with (if endeavoring to serve) A.U.S. Attorney Spohn and by mailing two copies~~ (Name of individual or agent of company, corporation, etc.) to the U.S. Attorney General by certified mail # 220941

personally at (if endeavor—show addresses where endeavors made) _____

450 Golden Gate Ave. San Francisco, California (Address—Street number, apartment number, rural route, etc.)

_____ (City) _____ (State) in the said District

at 9:00 a.m. ~~p.m.~~, on the 12th day of May, 1970.

SERVICE NOT COMPLETED

Date _____

I hereby certify and return, that on the _____ day of _____, 19____, I received the within _____ and that after diligent search, I am unable to find the within named _____ within said district.

Marshal's fees $3.00

Mileage 0

George E. Tobin
United States Marshal.

By _____ Deputy
Lester C. Young

[Filed June 11, 1970]

RETURN ON ORDER TO SHOW CAUSE AND MOTION TO DISMISS

Respondents by their attorneys hereby file a Return to the Order To Show Cause issued by this Court on April 10, 1970 and move that this action be dismissed on the ground that this Court lacks subject matter jurisdiction. Attached hereto and made a part hereof as Exhibit "A" is a certified copy of the Memorandum for: President of the Conscientious Objector Board, dated August 21, 1968.

I. Statement of Facts

Petitioner was commissioned as a second lieutenant in the Military Police Corps of the United States Army Reserve in June 1966 as the result of successfully completing the Army Reserve Officer Training Course at the University of California at Davis. Thereafter, he was permitted to defer his active duty obligation in order to complete his course of studies at Yale University Law School, which he accomplished in June 1969. At all times during this delay petitioner was assigned to the United States Army Reserve Components Personnel Center, Fort Benjamin Harrison, Indianapolis, Indiana. On October 1, 1969 petitioner was informed he would be initially assigned to Fort Gordon, Georgia, for two years active duty commencing April 13, 1970. Petitioner filed an application for discharge based on conscientious objection under the provisions of Army Regulation 135-25 on January 20, 1970, which was denied on April 7, 1970. He was scheduled to report to United States Army Military Police School, Fort Gordon, Georgia, on April 13, 1970. However, these orders were cancelled and, pending determination of this matter, successive new reporting dates have been issued.

* * * * *

DATED: June 11, 1970

James L. Browning, Jr.
United States Attorney

By: Richard F. Locke
Assistant United States Attorney

Attorneys for Respondents

ORDER

[Filed June 24, 1970]

This is a petition for a writ of habeas corpus by a lieutenant in the United States Army Reserve. He has been ordered to report for active duty in Georgia. The question before the court today is whether we have jurisdiction to entertain this petition. Since we find that this court does have habeas corpus jurisdiction, we need not reach petitioner's alternative contentions regarding bases for jurisdiction.

The Government argues that since petitioner is assigned to the United States Army Reserve Components Personnel Center at Fort Benjamin Harrison, Indiana, he is not in custody in this judicial district. See 28 U.S.C. § 2241. This precise question was considered in *Donigan v. Laird*, 308 F. Supp. 449, 451-53 (D. Md. 1969) and the court there held that the reservist did not have to bring his action in Indiana. This court concurs in the well-reasoned opinion of Judge Northrop both as a matter of law and of policy. Requiring petitioner to travel to Indiana to bring this action would be to exalt form over substance for the reasons given by Judge Northrop and would be directly contrary to the characterization of the writ recently rendered by the Supreme Court:

> [The writ] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from

> wrongful restraints upon their liberty. [*Peyton v. Rowe*, 391 U.S. 54, 66 (1968), quoting from *Jones v. Cunningham*, 371 U.S. 236, 243 (1963).]

A closely analogous case is *Nason v. Secretary of the Army*, 304 F. Supp. 422 (D. Mass. 1969) where the petition was a physician who was a reservist training under the "Berry Plan." He was likewise assigned to Fort Benjamin Harrison but the district judge held that the petitioner was sufficiently in custody in Massachusetts to prosecute his petition there. *Id.* at 424.[1]

As to a proper respondent, for the reasons given by Judge Northrop we find that Col. John Hoffman, commanding officer at Fort Benjamin Harrison, is such an individual. Pursuant to 28 U.S.C. § 1391(e), the action may be brought in this district.

Therefore, we reject the Government's contention that this Court is without jurisdiction. This matter will be set for a hearing on the merits to be held Friday, July 24, 1970 in San Jose at 2:30 o'clock p.m.

IT IS SO ORDERED.

DATED: June 24, 1970.

Robert F. Peckham
United States District Judge

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[1] *Jarretta v. Resor*, No. 24,668, Ninth Circuit, April 21, 1970, is distinguishable primarily because Jarrett was on active duty and therefore had an "assigned post" to which he was required to report. He brought the action while on leave and in transit between duty stations.

[Filed July 22, 1970]

RETURN ON ORDER TO SHOW CAUSE AND ANSWER TO THE PETITION FOR WRIT OF HABEAS CORPUS

Respondents by their attorneys hereby make a Return to the Order To Show Cause and an Answer to the Petition for Writ of Habeas Corpus. On June 24, 1970 this Court ruled that it had jurisdiction to entertain this action as a Petition for Writ of Habeas Corpus and set the matter for a hearing on the merits for July 24, 1970.

I. MOTION TO STRIKE THE PETITION AND TO DISMISS THE ACTION

Respondents move this Honorable Court to strike the petition and to dismiss the action for lack of jurisdiction over the subject matter in accordance with Rule 12(b) of the Federal Rules of Civil Procedure (FRCP).

As reason for this Motion, respondents state that the Court lacks jurisdiction over the subject matter because neither the petitioner nor anyone acting in his behalf has verified the petition as required by Section 2242, Title 28, United States Code, as amended. Verification is a condition precedent to entertaining a Petition for Writ of Habeas Corpus in a Federal District Court. *Application of Gibson*, 218 F.2d 320 (9 Cir., 1954), *cert. den.* 348 U.S. 955 (1955); *Dorsy v. Gill*, 148 F.2d 857 (D.C. Cir., 1945), cert. den. 325 U.S. 890.

II. MOTION TO VACATE TEMPORARY RESTRAINING ORDER

Since the Petition for Writ of Habeas Corpus was not verified in accordance with Section 2242, Title 28, United States Code, as amended, suit has not been initiated. *United States ex rel. Smith v. Warden*, 87 F. Supp. 339 (D. Pa., 1949), *affirmed* 181 F.2d 847 (3 Cir., 1950). As a result, the Temporary Restraining Order heretofore issued in this cause is void *ab initio* and should be vacated.

III. RESPONSE TO ALLEGATIONS

Respondents by their attorneys (assuming *arguendo* that this Court reaches the merits of the case) hereby respond to the allegations in the Petition, as amended, and admit only those facts not inconsistent with the affirmative allegations of fact in Part IV below. We are responding in this manner since the numbered averments do not comply with the provisions of Rules 8(a) and (c) and 10(a) and (c) of the Federal Rules of Civil Procedure in that they are prolix and do not individually set forth single sets of circumstances but on the contrary recite irrelevant and argumentative matter. We believe that all pertinent facts are contained in the exhibits attached hereto.

IV. AFFIRMATIVE ALLEGATIONS

Attached hereto and made a part of this Return and Answer are copies of the complete administrative file pertaining to petitioner's application for discharge as a conscientious objector and Army Regulation 135-20, dated April 11, 1969. The aforementioned documents are designated Exhibits "B" and "C", respectively, in order to preserve sequential clarity. (Exhibit "A" was filed with our initial Return and Motion To Dismiss.)

1. Petitioner, upon successful completion of the Reserve Officer's Training Candidate program at the University of California, Davis, was commissioned as a second lieutenant in the Military Police Corps, United States Army Reserve, on June 9, 1966 (B. 154).

2. Petitioner entered the Yale University of Law School in September 1966. He sought and was granted successive delays to permit him to obtain his degree (B. 150, 140, 137, 133, 132, 126)—the last to terminate on June 30, 1969.

3. On January 18, 1969 petitioner was directed to submit a medical examination prior to his entry on active duty (B. 125). On February 18, 1969 he was examined and found physically fit to enter on active duty (B. 120-123).

4. On June 7, 1965 petitioner accepted without comment a promotion to the grade of First Lieutenant, United States Army Reserve (B. 153).

5. On July 9, 1969, after he [petitioner] had declined an appointment in the Judge Advocate General's Corps, petitioner was notified that he was scheduled to report to Fort Gordon, Georgia, on Feburary 9, 1970 to fulfill his two year active-duty obligation (B. 117).

6. Thereafter, petitioner's active duty orders were amended to an April 13, 1970 reporting date (B. 115, 116).

7. On January 20, 1970 petitioner submitted an application for discharge as a conscientious objector (B. 13-79).

8. On February 1, 1970 petitioner requested guidance from Army authorities as to his required medical examination and his active duty date of April 13, 1970 (B. 113) in view of his pending application.

9. On February 3, 1970 petitioner was notified that his application was being expeditiously processed; however, he was expected to comply with his reporting date of April 13, 1970 should a final decision not be forthcoming prior thereto (B. 112).

10. On February 18, 1970 petitioner was directed to report for a new medical examination as soon as possible (B. 111).

11. On February 19, 1970 petitioner was examined by a psychiatrist. Army Regulation 135-25, Paragraph 7b(2). The psychiatrist found no evidence of mental disease (B. 87).

12. On February 20, 1970 petitioner was interviewed by a chaplain. Army Regulation 135-25, Paragraph 7b(1). The chaplain found that petitioner was sincere in his beliefs and that these beliefs were "primarily religious in basis and origin" (B. 88).

13. On February 20, 1970 petitioner appeared with retained counsel before an officer in the grade of 0-3. Army Regulation 135-25, Paragraph 7b(3). The hearing

officer, Captain Wallace, found that (1) petitioner's beliefs were religious in nature; (2) his beliefs were sincerely held; and (3) these beliefs became fixed during petitioner's second year of law school (B. 90-92).

14. On March 20, 1970 the Chief of the Delayed Officer Management Division recommended disapproval on the basis that these beliefs merely constituted a personal moral code (B. 80-81).

15. On March 27, 1970 the Department of the Army, Conscientious Objector Review Board met at Fort Benjamin Harrison, Indiana, and in a report dated April 7, 1970 disapproved the application (B. 5-10). The Board based its denial on two grounds: (1) petitioner's lack of sincerity and (2) petitioner's lack of religious training and beliefs in support of his application, i.e., his beliefs constituted merely a personal moral code having its genesis in political reasoning, sociological experiences and philosophical views culminating in an aversion to a particular war–Vietnam (B. 6).

16. On April 7, 1970 petitioner was sent written notification of the disapproval and was directed to comply with his active duty reporting day of April 13, 1970 (B. 1).

* * * * * *

Dated July 22, 1970

James L. Browning, Jr.
United States Attorney

By: Richard F. Locke
Assistant United States Attorney

Attorneys for Respondents

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

Tuesday, July 28th, 1970

PRESENT: HONORABLE ROBERT F. PECKHAM, U.S. District Judge

Ramon E. Xavier, Clerk
Roberta Rogers, Court Reporter

* * * * *

Lt. John A. Strait vs. Melvin R. Laird, et al

This action came on for hearing on July 24th, 1970, before the Court, Honorable Robert F. Peckham, United States District Judge, presiding, and the issues having been duly presented and a decision having been duly rendered,
IT IS ORDERED AND ADJUDGED that the Petitioner's Application for Writ of Habeas Corpus, is denied.

* * * * *

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LIEUTENANT JOHN A. STRAIT,
Petitioner-Appellant,

v.

MELVIN R. LAIRD, Secretary of Defense;
STANLEY R. RESOR, Secretary of the Army;
LIEUTENANT GENERAL STANLEY LARSEN, Commanding General, Sixth United States Army;
MAJOR GENERAL PHILLIP B. DAVIDSON, JR., Commanding General, Fort Ord, California;
COLONEL JOHN J. HOFFMAN, Commanding Officer, United States Army Reserve, Components Personnel Center, Fort Benjamin Harrison, Indiana,
Respondents-Appellees.

No. 26,289

[Filed February 17, 1971]

On Appeal from the United States District Court for the Northern District of California

Before: MERRILL and KOELSCH, Circuit Judges, and JAMESON, District Judge*

MERRILL, Circuit Judge:

By these proceedings in habeas corpus appellant seeks judicial review of an administrative decision of the Depart-

*Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

ment of the Army denying his request for discharge as a conscientious objector. This appeal is taken from judgment of the District Court for the Northern District of California denying, on the merits, the relief sought. A cross-appeal has been taken by appellees from that portion of the District Court's judgment holding that it had jurisdiction in habeas corpus.

Appellant is an officer in the United States Army Reserve. He received his commission in 1966 on completion of the ROTC course at the University of California at Davis. He was then placed on a delayed reserve status in order to permit him to attend law school at Yale University. Upon graduation from law school, and after being permitted to take the bar examination, he was, in July 1969, ordered to report to Fort Gordon, Georgia, on February 9, 1970 to commence two years active duty as an Army officer. The reporting date was later changed to April 13, 1970.

On January 20, 1970 appellant applied for discharge as a conscientious objector. Pursuant to Army regulations respecting reserve officers the application was submitted to the United States Army Reserve Components Personnel Center at Fort Benjamin Harrison, Indiana. Processing of the application by interviews and hearing was had at Fort Ord, California, and the record was then forwarded to Fort Benjamin Harrison for review by the Conscientious Objector Discharge Review Board. On that Board's recommendation the application for discharge was disapproved by the commander of the Reserve Components Personnel Center. This action followed.

A. *JURISDICTION*

Threshold questions are presented by the cross-appeal of appellees respecting the habeas corpus jurisdiction of the District Court under 28 U.S.C. § 2241.

1. *Was appellant "in custody"?*

It is clear from §2241(c) that the petitioner's being in custody is a jurisdictional requirement. The statute, however, does not define custody. Since the Supreme Court's decisions in *Jones v. Cunningham*, 371 U.S. 236 (1963), and *Peyton v. Rowe*, 391 U.S. 54 (1968), the concept of custody in habeas corpus has taken on new dimensions, both of space and of time. See generally, Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1071-92 (1970).

The question posed is whether a member of the Army Reserve who has been ordered to report for active duty at a future date is presently under restraint sufficient to amount to custody.

This question was dealt with in *Hammond v. Lenfest*, 398 F.2d 705, 710-12 (2d Cir. 1968), where it was held that the restraints were sufficient to constitute custody—"a custody loose at the moment but a custody which may at any time be made as close as the military establishment, by future order or regulation, shall direct." 398 F.2d at 711.

We agree.[1]

2. *Was appellant held in custody within the territorial jurisdiction of the District Court?*

Section 2241(a) provides that the writ may be granted by District Courts "within their respective jurisdiction."

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[1] *Johnson v. Laird*, ___ F.2d ___ (9th Cir. Nov. 24, 1970), is not inconsistent. There the Army had refused to process the conscientious objection claim of a member of the National Guard filed after he had received orders to report for active duty. This court, in denying habeas corpus, held that the Army was not required to process the claim prior to the applicant's reporting as ordered. This ruling was not due to any lack of custody prior to reporting (the court recognized that potential restraint could suffice), but was based on the fact that assignment to active duty had been ordered as discipline for the petitioner's absence without leave, with which Army business this court refused to interfere.

> "The quoted statutory language limits the power of the District Court to hear and determine a petition for habeas corpus to those instances in which the applicant 'both is physically present in the court's territorial jurisdiction and is detained or held in custody within that jurisdiction.' *United States ex rel Rudick v. Laird*, 412 F.2d 16, 20 (2d Cir. 1969)." *Jarrett v. Resor*, 426 F.2d 213, 217 (9th Cir. 1970).

In *Jarrett* this court held that the petitioner was not in custody in the Northern District of California. While his home was in that district, he was in active military service and was stationed at Fort Knox, Kentucky. He was on leave in California awaiting "port call" pursuant to an assignment to duty in Vietnam. His command post remained Fort Knox. We held: "A member of the armed forces who is voluntarily in a place another than an assigned post is not in custody in that place." 426 F.2d at 217.

Respondents rely on that case as support for their contention that appellant was not in custody in California. We find that case distinguishable.

Here appellant's home is in the Northern District of California. As a member of the Army Reserve his activities are directed by the Reserve Officers' Components Personnel Center at Fort Benjamin Harrison, Indiana. He was, however, attached to no unit. We have here held that he was under sufficient restraint to constitute custody, and it was at his home in California that these restraints were imposed and their effect felt. Certainly the restraint did not involve performance of duty at Fort Benjamin Harrison. Appellant's home in California was, then, the delayed Reserve equivalent of a duty station.[2] We conclude that he was in custody in the Northern District of California.

[2]When the reservist is, with the approval of the Center, pursuing activities in a state other than his home, the pursuit of which provided the basis for his delayed status (as was true here while appellant was attending law school in Connecticut), it would seem that he is in custody in that state since he is in effect assigned to duty there

3. *Was the presence of appellant's commanding officer within the territorial jurisdiction of the District Court essential to its jurisdiction in habeas corpus?*

Historically, habeas corpus was available only to those persons held in actual physical confinement. Therefore, the respondent-custodian was always to be found in the territorial jurisdiction in which the prisoner-petitioner was held in custody. It is not surprising that no case prior to the expansion of the custody concept in *Jones v. Cunningham, supra,* held that one in custody within the territorial jurisdiction of the court could not there obtain habeas relief because of the absence of the proper respondent.[3] The territorial restrictions on habeas jurisdiction which did then develop were intended to avoid problems posed by having to transport a prisoner to a distant forum. See *Carbo v. United States,* 364 U.S. 611 (1961); *Ahrens v. Clark,* 335 U.S. 188 (1948).

Now that one may be in custody although not subject to actual physical restraints, the courts are confronted with a whole new class of petitioners, many of whom, like appellant, may be in custody in a state other than that in which the respondent is located.

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and it is there that restraints are felt. *Donigian v. Laird,* 308 F.Supp. 449 (D.Md. 1969); *Nason v. Secretary of the Army,* 304 F.Supp. 422 (D.Mass. 1969).

[3]There is language in a few cases to the effect that the presence of the respondent within the territorial jurisdiction is required, but the language was not directed to the problem we are facing. In most of the cases the critical factor in the opinion was the fact that the petitioner was not in custody in the jurisdiction. See *United States ex rel Keefe,* 222 F.2d 390 (D.C.Cir. 1954), *cert. denied,* 348 U.S. 952 (1955); *Sanders v. Bennett,* 148 F.2d 19 (D.C.Cir. 1945); *United States ex rel Harrington v. Schotfeldt,* 136 F.2d 935, 940 (7th Cir. 1943), *cert. denied,* 327 U.S. 781 (1946). Elsewhere similar language has been used to suggest that a court does not lose its habeas corpus jurisdiction when a petitioner is removed from the district as long as the respondent remains. *Ex Parte Endo,* 323 U.S. 283, 306 (1944).

We can see no persuasive reason for making physical presence of the respondent a jurisdictional requirement in such cases.[4] Since respondents seek to make their restraints felt on petitioner in California and thereby to extend the reach of their authority into the territorial jurisdiction of the District Court below, the respondents are in our view sufficiently present to be subject to the jurisdiction of that court.

As stated in *Donigian v. Laird*, 308 F.Supp. 449, 453 (D. Md. 1969):

> "For its own convenience and economy, the Army has chosen to centralize its command with respect to Reserve Officers in Donigian's position, rather than having smaller commands throughout the country. The effect on the plaintiff is no different, however, than it would be if his orders were issued to him directly from a local headquarters. The Army seeks to exert control over Donigian in Maryland. It cannot, then, avoid the jurisdiction of this court merely because such control is exercised from a point located outside of this state."

The District Court, then, had jurisdiction to entertain these proceedings. Having jurisdiction, venue is conferred by 28 U.S.C. §1391(e). Upon the cross-appeal of appellees, judgment is affirmed.

B. *THE MERITS*

In the processing of appellant's application for discharge at Fort Ord, appellant was first interviewed by an Army psychiatrist who found "no signs of psychiatric disease." He was then interviewed by an Army chaplain who reported: "I believe that he is sincere in indicating that his religious beliefs preclude participation in war in any form.

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[4]Of course, as this court noted in *George v. Nelson*, 410 F.2d 1179, 1181 (9th Cir. 1969), change of venue, pursuant to 28 U.S.C. §1404(a), is available in proper cases.

I believe that his convictions are primarily religious in basis and origin."

Appellant was then given a hearing by an Army captain as hearing officer. The hearing was thorough, consuming approximately three hours. The report of this officer discussed appellant's concept of a Supreme Being and of the nature of religion and his views respecting violence and war. The report concluded: "Based upon Lieutenant Strait's stated beliefs and the sincerity with which he appeared to hold these beliefs, it is my determination that Lieutenant Strait's beliefs fall with a *very liberal* interpretation of the case of *United States v. Seeger*, 85 S.Ct. 850 (1965)." Further, "it is my opinion that Lieutenant Strait's beliefs are sincerely held."

At Fort Benjamin Harrison appellant's record was first reviewed by a lieutenant colonel, chief of the Delayed Officer Management Division, acting in the capacity of appellant's immediate commander. His report recommended disapproval, citing appellant's political activities and concluding that the chaplain and the hearing officer "erred or were misled in their determination that [his] beliefs were religious in origin."

The Review Board then acted and, with three members out of fifteen participating, recommended disapproval for these reasons:

1. That appellant's beliefs were not truly held.

2. That they were not religiously founded but reflected political, sociological and philosophical views and a personal moral code.

3. That appellant's objections to war were confined to this particular war.

We have carefully reviewed the record and conclude that the findings of the Review Board are wholly without basis in fact.

The greater part of the Board's memorandum is devoted to the proposition that appellant's views were not reli-

giously founded. This, appellees concede, was error, since appellant's views meet the standards announced in *Welsh v. United States*, 398 U.S. 333 (1970), handed down after the Board had taken its action.

There is no support for the Board's finding that appellant's objections to war were limited to Vietnam. The application makes clear the scope of his objections to violence and to war in general. The fact that his political action and expressions of protest were directed against the one war in which this country was engaged is not inconsistent with his avowed beliefs. It indicates no more than that there was a limited area in which action in support of his beliefs was called for.

The sole remaining basis for rejection of the application was the Board's finding that appellant's views were not truly held. In this, acting upon the cold record and without benefit of interview or opportunity for rebuttal of its findings by appellant (which opportunity Army regulations appear to regard as due), it rejected the findings of those who had interviewed appellant to the effect that his views were sincerely entertained.

Two reasons were given by the Board. It stated that this was the first case of conscientious objection that the hearing officer had reviewed. This was simple error. The officer had had substantial past experience in this respect.

The sole remaining reason for finding lack of sincerity (and the reason on which appellees now rely as establishing basis in fact) was appellant's delay in applying for discharge after crystallization of his beliefs, which the hearing officer had found to have occurred in his second year of law school. The Board emphasized that there were earlier opportunities—occasions on which, if objections did exist, one would have expected them to be expressed: (1) Appellant in 1968 requested an extension of delay status to permit him to take a bar examination and qualify for judge advocate general commission (which commission he later refused); (2) in 1969 a certificate of medical fitness was

provided by him; (3) in 1969 he was promoted to the rank of first lieutenant.

The Board apparently felt that appellant had not adequately explained his delay in expressing his views. It concluded that he was nothing more than "an educated, skillful opportunist who had used his military status for every shred of protection it could offer and then, when called to active duty, attempted to gain relief from his obligation under the guise of a conscientious objector claim."

But the reasons for appellant's delay were explicitly set forth in his application and in a manner wholly consistent with the existence of conscientious objection.[5] He states that he recognized that he recognized that he had placed himself "in an untenable position in relation to the Army * * *. The last year of my life has been a stormy period of sould searching and agoning, trying to reconcile my beliefs and conscience with my contract with the Army." It was the suicide of his cousin (also a conscientious objector) in November of 1969 that ultimately "broke the emotional bind I was in and freed me to assert my beliefs."

We do not find it implausible that one with conscientious scruples[6] should find it difficult casually to dismiss his obligations to the Army. Rather we regard it as wholly consistent with conscientious objection that the enlisted soldier

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[5]The "opportunist" aspect disappears when it is recognized (as counsel for appellees concedes) that the "protection" enjoyed by appellant was no greater than the Selective Service regulations then applicable would have afforded through student deferments.

[6]That appellant's conscience manifested itself in areas other than objection to war is abundantly established. Among other activities he worked for the United States Commission on Civil Rights in Alabama and in the southwest; he participated in a project engaged in reviewing arrest records and interviewing blacks who had been arrested; he served as an observer of the first attempts of the blacks in Mississippi to organize politically.

should strive to find some means of reconciling a conflict between conscience and duty in such a fashion that both might be respected and to postpone repudiation of the claims of duty until it becomes clear that their demands make reconciliation impossible.

Accordingly we find the explanation given by appellant for delay in asserting his claim to be reasonable and credible unless some basis for rejecting it otherwise appears from the record. We have searched in vain for such basis.

We conclude, then, that no basis in fact exists for rejection of appellant's claim and that he is entitled to his discharge.

Appellant in his application for discharge expressed his consent to perform postmilitary work of the nature encompassed by the civilian work program administered by the Selective Service System. His hearing officer, in recommending discharge, recommended that he be required to perform such work. In our view such a condition of discharge would be proper under the circumstances.

Accordingly the matter is remanded with instructions that the Army be allowed a reasonable time within which to grant discharge to appellant pursuant to Army regulations applicable to conscientious objectors; failing which, discharge (subject to an order to perform appropriate civilian work) shall be granted by the District Court.

JAMESON, District Judge (Concurring):

I agree with Judge Merrill that there is no basis in fact for rejecting appellant's claim as a conscientious objector on the ground of insincerity. I think it is clear from the record before this court that appellant was a sincere conscientious objector when he applied for discharge on January 20, 1970 and for at least two years prior thereto. This conclusion, however, should not be construed as justifying or condoning appellant's conduct in accepting the benefits of his reserve commission without disclosing his conscientious objector beliefs until he was called for active duty.

Appellant attended Yale Law School from September, 1966 to June, 1969. The Hearing Officer found that appellant's beliefs were religious in nature, sincerely held, and became "fixed during [his] second year of law school," i.e., between September, 1967 and June, 1968. The finding of the Conscientious Objector Review Board (in a decision prior to Welsh v. United States, 398 U.S. 333 (1970) that appellant's "alleged conscientious objector beliefs are not truly held" was interwoven with its finding that the beliefs "are poorly grounded in religious training and belief; and any objection to war in any form he might truly hold is based solely on political reasons, sociological experiences, philosophical views, a personal moral code, and objection to a particular war." Appellees concede that appellant's beliefs, "if truly held, would qualify under Welsh v. United States * * * ."

Appellant's detailed application recounts substantial anti-war and antidraft activities beginning in the fall of 1967 and, as he stated, much of his work "concerned conscientious objection." All of the other evidence presented in support of the application indicates that appellant's conscientious objector beliefs were truly held under the test of religious belief recognized in Welsh.

On the other hand, I think the Board could properly find that the imminence of active duty was the cause of appellant's application for discharge. On August 20, 1968, appellant requested that his delayed status be continued until January 1, 1970 to permit him to take the California bar examination and qualify for a Judge Advocate General commission. On February 15, 1969 he returned a Certification of Medical Fitness indicating that he was physically qualified for military service. On June 7, 1969 he was promoted to first lieutenant, and apparently accepted without comment. On July 9, 1969, after declining an appointment in the Judge Advocate General Corps, appellant was notified that he was scheduled to report for active duty on February 9, 1970 (later amended to April 13, 1970). On October 1, 1969 he again requested rescheduling of his active duty commencement date. On January 20, 1970 applicant sub-

mitted his application for discharge as a conscientious objector. At no time prior thereto had he asserted his conscientious objector beliefs.

It is true, as appellees argue, that this court has held in a number of cases that the Board may consider "suddenness of conversion," particularly after receipt of an order to report for active duty, in determining whether conscientious objector beliefs are sincerely held.[1] These cases were decided prior to Welsh v. United States and are distinguishable with respect to the religious test to be applied. In most of them there was additional evidence to support a finding of insincerity. By reason of appellant's failure to assert his conscientious objector beliefs until called for active duty, a close question is presented.[2] From a review of all the evidence, however, I conclude that this fact alone is not sufficient to support a finding that applicant's conscientious objector beliefs were not truly and sincerely held.[3]

---

[1]See e.g., Maynard v. United States, 409 F.2d 505 (1969); Bishop v. United States, 412 F.2d 1064 (1969); Negre v. Larsen, 418 F.2d 908 (1969); and Speer v. Hedrick, 419 F.2d 804 (1969).

[2]The obvious feeling of the Board that appellant should have submitted an application for discharge at an earlier date is understandable. It is true, as the Board's decision indicates, that appellant was willing to accept any benefits of his status as a reserve officer until he was required to report for active duty. On the other hand, there was no legal obligation to submit an earlier application, and his own explanation, as set forth in Judge Merrill's opinion, is credible, even though different inferences may also properly be drawn.

[3]In fact, it is difficult to see how appellant could have entered active duty without making an application for discharge in the light of his beliefs and activities as set forth in detail in the record.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LIEUTENANT JOHN A. STRAIT,
Petitioner-Appellant,

v.

MELVIN R. LAIRD, Secretary of Defense;
STANLEY R. RESOR, Secretary of the Army;
LIEUTENANT GENERAL STANLEY LARSEN, Commanding General, Sixth United States Army;
MAJOR GENERAL PHILLIP B. DAVIDSON, JR., Commanding General, Fort Ord, California;
COLONEL JOHN J. HOFFMAN, Commanding Officer, United States Army Reserve, Components Personnel Center, Fort Benjamin Harrison, Indiana,
Respondents-Appellees.

No. 26,289

[June 4, 1971]

ORDER ON REHEARING

Before: MERRILL and KOELSCH, Circuit Judges, and JAMESON, District Judge*

Appellees' petition for rehearing is granted.

It is ordered that the opinion filed herein on February 17, 1971, is withdrawn and the judgment rendered is vacated and that in their stead the accompanying opinion and judgment will be filed.

*Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation

On Appeal from the United States District Court for the Northern District of California

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Before: MERRILL and KOELSCH, Circuit Judges, and JAMESON, District Judge*

PER CURIAM:

By these proceedings in habeas corpus appellant seeks judicial review of an administrative decision of the Department of the Army denying his request for discharge as a conscientious objector. This appeal is taken from judgment of the District Court for the Northern District of California denying, on the meirts, the relief sought. A cross-appeal has been taken by appellees from that portion of the District Court's judgment holding that it had jurisdiction in habeas corpus. We do not reach the merits of appellant's appeal, for we conclude that on the cross-appeal of appellees judgment of the District Court must be reversed and the proceedings dismissed for lack of jurisdiction.

Appellant is an officer in the United States Army Reserve. He received his commission in 1966 on completion of the ROTC course at the University of California at Davis. He was then placed on a delayed reserve status in order to permit him to attend law school at Yale University, from which he graduated in 1969. Since he has not yet reported for active duty, appellant is attached to no unit. As a member of the army reserves, his activities are directed by the United States Reserve Components Personnel Center at Fort Benjamin Harrison, Indiana.

On January 20, 1970, appellant applied for discharge as a conscientious objector. Pursuant to army regulations the applicaion was submitted to the Reserve Components Personnel Center. Since appellant was residing at his home in the Northern District of California, processing of the appli-

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*Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

cation by interviews and hearing was had at Fort Ord, California, and the record was then forwarded to Indiana for review by the Conscientious Objector Discharge Review Board. On the Board's recommendation the application for discharge was disapproved by the commander of the Personnel Center. This action followed.

Appellant argues that he is in custody within the territorial jurisdiction of the District Court below and, therefore, that that court had jurisdiction in habeas corpus. *Schlanger v. Seamans*, U.S. (March 3, 1971), compels us to disagree. Even if we concede that appellant is in custody within the jurisdiction of the District Court (which appellees dispute),[1] his custodian—the commander of the Reserve Components Personnel Center at Fort Benjamin Harrison—remains outside of the jurisdiction of that court. As stated in *Schlanger*: "Hence, even if we assume that petitioner is 'in custody' in Arizona in the sense that he is subject to military orders and control which act as a restraint on his freedom of movement * * * the absence of his custodian is fatal to the jurisdiction of the Arizona District Court."

Appellant contends that, as an alternative to his habeas corpus theory, the District Court had jurisdiction in mandamus to require the army to process his application for discharge in accordance with regulations with which it has allegedly failed to comply. Mandamus is an extraordinary remedy which is to be utilized only in the most urgent cases. *See, e.g., Ex Parte Collett*, 337 U.S. 55, 72 (1949). Its issuance lies within the sound discretion of the court. *Cmax Inc. v. Hall*, 300 F.2d 265 (9th Cir. 1969); *see Whitehouse v. Ill. Cent. R. Co.*, 349 U.S. 366, 373 (1955). Since appellant asserts that the army's decision to deny him his discharge was without basis in fact, the mandamus remedy would not afford complete relief. *Cf., Pacific Car and Foundry Co. v. Pence*, 403 F.2d 949, 952-53 (9th Cir.

[1] This question the Supreme Court in *Schlanger* did not reach, although it noted the problem and cited *Donigan v. Laird*, 308 F. Supp. 449 (D. Md. 1969), on which appellant relies.

1958). Above all, since appellant may obtain relief by habeas corpus in the federal courts in Indiana, there exists another adequate remedy. *See Carter v. Seamans*, 411 F.2d 757 (5th Cir. 1969). For these reasons we feel that issuance of the writ in these circumstances would not be appropriate.[2]

Upon the cross-appeal of appellees judgment is reversed and the matter remanded to the District Court with instructions that the proceedings be dismissed for want of jurisdiction.

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[2]This is not to say that the court lacked jurisdiction to issue a writ. The territorial restraints which obtain in habeas do not preclude mandamus jurisdiction. *See Schlanger v. Seamans, supra,* at n. 4; 28 U.S.C. § 1391 (e); Sen. Rep. No. 1992, 87th Cong., 2d Sess., 2 U.S. Code and Adm. News (1962) 1784; 2 Moore's Federal Practice ¶ 4.29.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-83

LT. JOHN A. STRAIT,

Petitioner,

—v.—

HON. MELVIN R. LAIRD, Secretary of Defense; HON. STANLEY R. RESOR, Secretary of the Army; LIEUTENANT GENERAL STANLEY LARSON, Commanding General, Sixth United States Army; MAJOR GENERAL PHILIP B. DAVIDSON, JR., Commanding General, Fort Ord, Calif.; COLONEL JOHN H. HOFFMAN, Commanding Officer, United States Army Reserve Components Personnel Center, Fort Benjamin Harrison, Indiana,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

LT. JOHN A. STRAIT,

Petitioner,

—v.—

HON. MELVIN R. LAIRD, Secretary of Defense; HON. STANLEY R. RESOR, Secretary of the Army; LIEUTENANT GENERAL STANLEY LARSON, Commanding General, Sixth United States Army; MAJOR GENERAL PHILIP B. DAVIDSON, JR., Commanding General, Fort Ord, Calif.; COLONEL JOHN H. HOFFMAN, Commanding Officer, United States Army Reserve Components Personnel Center, Fort Benjamin Harrison, Indiana,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner JOHN A. STRAIT prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case having docket number 26289 in said court. The opinion of said court was filed on June 4, 1971.

Opinion Below

The opinion of the court below on rehearing, as yet unreported, is reproduced herein as Appendix A1. The opin-

ion filed February 17, 1971, but vacated by order of the Court on June 4, 1971, appears as Appendix A2.

Jurisdiction

The final opinion below was filed on June 4, 1971. The Court of Appeals had filed an opinion on February 17, 1971. However, on June 4, 1971, on respondents' petition for rehearing, the court vacated the opinion of February 17 and filed the opinion of June 4 in its place.

The judgment of the court below reversed the district court's order that it had jurisdiction under the Habeas Corpus Statute, 28 U.S.C. §2241, to review a denial of petitioner's request for discharge from the Army. The Court of Appeals directed the district court to dismiss the petition. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Did the district court have jurisdiction under the Habeas Corpus Statute, 28 U.S.C. 2241 et seq.?
2. Does the Mandamus and Venue Act of 1962 provide a method of reviewing, under the basis-in-fact test, military administrative determinations, and does the Court of Appeals' construction of the scope of review and extraordinary nature of the remedy created therein undermine the intent of Congress expressed in 28 U.S.C. §1361?
3. Did the district court have jurisdiction under other statutes providing for judicial review of federal administrative actions—*e.g.*, 5 U.S.C. §§701-703 and 28 U.S.C. §1331(a)?

Constitutional Statutory and Regulatory Provisions Involved

The full text of the constitutional, statutory, and regulatory provisions involved herein is set forth in Appendix B. The cited provisions are as follows:

Constitution of the United States:

Article I, Section 9 (Habeas Corpus)
Fifth Amendment (Due Process)

Title 5 United States Code:

§§701-703 (Supp. V, 1965-70)

Title 28 United States Code:

§1331(a) (1964)
§1361 (1964)
§1391(e) (1964)
§2241(a) and (b) (1964 and Supp. V, 1965-70)

Army Regulation 135-25 (Sept. 2, 1970)

Statement of the Case

A. *Nature of the Proceedings.*

This is an action seeking judicial review of an administrative decision of the Department of the Army denying petitioner's request for discharge as a conscientious objector. Petitioner appeals, pursuant to 28 U.S.C. §1254(1), from a judgment of the Court of Appeals for the Ninth Circuit remanding the proceedings to the district court with instructions to dismiss the action for lack of jurisdiction.

B. *Proceedings Below.*

The petitioner, LIEUTENANT JOHN A. STRAIT, [hereinafter LT. STRAIT] is an officer in the United States Army Reserve. On April 9, 1970, he filed an action in the District Court captioned PETITION FOR WRIT OF HABEAS CORPUS: FOR MANDAMUS: FOR DECLARATORY RELIEF AND MOTION FOR A TEMPORARY RESTRAINING ORDER (R 1).[1] In the petition LT. STRAIT requested the court to declare that he was entitled to be separated from the Army as a conscientious objector, to issue a writ of habeas corpus discharging him from the custody and control of the Army, and to restrain the Army from requiring him to report for active duty (R 11-12).

Pursuant to the latter prayer, the court issued an order to show cause on April 10, 1970, and ordered "that the petitioner remain within the jurisdiction of this Court, that he not be assigned duties inconsistent with the provisions of AR 135-25" (R 106). The order to show cause was returnable on April 24, 1970, but subsequently the matter was continued by stipulation to June 12, 1970. On the basis of documents which had come into his possession after he filed the original petition, LT. STRAIT filed an amended petition on May 11, 1970 (R 112-163).

On June 11, 1970, respondents filed a RETURN ON ORDER TO SHOW CAUSE AND MOTION TO DISMISS, alleging that the court lacked jurisdiction because LT. STRAIT was not assigned to a unit within the district (R 186). The motion to dismiss was argued on June 12, 1970, and on June 26, 1970, the court denied the motion in an opinion reported at 3 Selective Service Law Reporter (SSLR) 3158 (R 216).

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[1] All references are to the paginated Clerk's Record filed with the Court of Appeals. No reporter's transcript was prepared for the appeal, there having been no evidentiary hearing in the district court.

Thereafter on July 22, 1970, respondents filed another RETURN and ANSWER (R 218), and the matter was argued on the merits on July 24, 1970. On July 28, 1970, by minute order, the court "ORDERED AND ADJUDGED that the Petitioner's Application for Writ of Habeas Corpus, is denied" (R 233-A). LT. STRAIT then moved on July 31, 1970, for reconsideration and for findings of fact. Accordingly, further argument of counsel was heard on August 4, 1970, and on the same day the court ordered, again by minute order, that the motion for reconsideration be denied (R 251).

LT. STRAIT then appealed the denial of his petition to the Court of Appeals for the Ninth Circuit (R 245). Respondents filed a cross-appeal on the jurisdictional issue (R 255). The matter was then briefed and oral argument was held on September 11, 1970.[2] On February 17, 1971, the Court of Appeals entered a judgment and opinion affirming the district court's jurisdictional order but reversing its denial of relief on the merits (Appendix A-2). Respondents then moved for an extension of time to petition for rehearing, and they were allowed until April 2, 1971, to file such a petition. On March 23, 1971, the Supreme Court decided *Schlanger* v. *Seamans*, —— U.S. ——, 91 S.Ct. 995 (1971), and respondents petitioned for rehearing on the basis of *Schlanger*.

The Court of Appeals requested a response from LT. STRAIT, who argued that *Schlanger* was not applicable here-

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[2] The Court of Appeals declined to extend the district court's stay of LT. STRAIT's military activation, but Mr. Justice Douglas, acting as Circuit Justice, ordered such a stay pending appeal on August 16, 1970. LT. STRAIT has remained in inactive status pursuant to said order.

in. LT. STRAIT also briefly alluded to other jurisdictional statutes which had been pleaded in but not reached by the district court. He asked for an opportunity to further brief and argue those alternate theories if the court decided to apply *Schlanger*. On June 4, 1971, however, the court entered a new judgment and opinion ordering the action dismissed. No further briefing or argument was allowed, even though the court's opinion expressly or impliedly disposed of all jurisdictional issues.

C. *Statement of Facts.*

LT. STRAIT attended the University of California at Davis and was graduated in June 1966, whereupon he was commissioned as a second lieutenant in the United States Army Reserve, having completed the ROTC course as a Distinguished Military Graduate. He was then placed on a delayed reserve status in order to attend law school (R 2).

As a reserve officer with a delayed active duty obligation,[3] LT. STRAIT was not required to attend reserve drills or summer encampments. Rather his military records were maintained at the United States Army Reserve Components Personnel Center [hereinafter RCPC] located at Ft. Benjamin Harrison, Indiana (R 2). During the period between his commissioning (June 1966) and the commencement of this action (April 1970), LT. STRAIT attended the Yale Law School in New Haven, Connecticut (1966-69), and then returned to his home in San Francisco in order to take

[3] In this category are included all ROTC graduates who are deferred for graduate study and other purposes, medical school graduates who are enlisted under the "Berry Plan" (whereby they undertake a civilian internship and residency at their own expense), as well as all inactive duty reserve officers who have completed their "active" reserve obligation. Petitioner believes that these officers number in the thousands.

the California Bar Examination and to begin working as a law clerk with the San Francisco Neighborhood Legal Assistance Foundation (R 2, 15).

Throughout the entire period of his contacts with the Army, LT. STRAIT's permanent residence was that of his parents in San Francisco, California (within the jurisdiction of the Northern District of California), where he physically resided when not attending school (R 113). Moreover, all of his official, physical contacts with the Army have taken place at Army installations located within the Northern District of California, including those contacts (*i.e.*, interviews and hearings) related to his request for discharge (R 15). LT. STRAIT has *never* been in Indianapolis, Indiana, *nor has he ever* been officially on any Army installation other than those located within the Northern District of California.

Upon graduation from law school and after being permitted to take the bar examination, LT. STRAIT was ordered to report to Fort Gordon, Georgia, on April 16, 1970, to commence two years' active duty as an Army officer (R 103). During his second year of law school, however, LT. STRAIT began to have misgivings about his acceptance of a commission and his participation in the Army. He continued to struggle with the growing conflict within himself between duty to country and duty to conscience until November 1969, when a traumatic event occurred in his life. At that time he learned of the suicide of a close cousin, who was also a conscientious objector. The shock of learning of his cousin's death caused LT. STRAIT's qualms about military service to crystallize or become fixed into a full-blown conscientious objection to war (R 4).

As a result, he immediately began to prepare an application for discharge and to gather together the supporting

letters of friends, associates, and family (R 57-93). He thereupon filed his request for discharge on January 20, 1970 (R 2). Upon receipt of his application, the RCPC directed that certain aspects of the processing of his application, required by AR 135-25, be completed at Fort Ord, California, near LT. STRAIT's home within the Northern District of California (R 93 and Respondents' Exhibit A-82). Accordingly, various interviews and hearings were held at Fort Ord during February and early March 1970 (R 98-102).

LT. STRAIT's application and supporting letters, and the reports of the three interviewing officers (all favorable), were then forwarded to Fort Benjamin Harrison, Indiana, for further processing (Respondents' Exhibit A-85). It is critical to note here that none of the events which thereafter transpired, and which are hereinbelow described, were known to LT. STRAIT or his counsel until after suit was filed in the district court. None of the information which was added to his discharge application file was made known to him, nor was he even apprised that such information would be added to his file.

The first transaction which apparently occurred at Fort Benjamin Harrison was a review of LT. STRAIT's file by a Lt. Col. Raymond M. Vawter, Chief of the Delayed Officer Management Division. Lt. Col. Vawter recommended disapproval, primarily on the basis that LT. STRAIT's views were not religious in nature (R 222). With this recommendation attached, the file was then apparently forwarded to the Conscientious Objector Discharge Review Board.[4]

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[4] The Conscientious Objector Discharge Review Board at Ft. Benjamin Harrison reviews all C.O. discharge applications and makes findings and recommendations to the Commanding Officer,

The Review Board consisted of 13 voting members, and two advisory members without vote. Nevertheless, only three of the voting members, and none of the advisory members, were present when LT. STRAIT's case was acted upon. These three members of the board prepared findings which were submitted, together with a recommendation of disapproval, to COL. JOHN H. HOFFMAN, the Commanding Officer of the RCPC. COL. HOFFMAN apparently accepted the recommendation on the same day (April 7, 1970), and disapproved the request for discharge (R 156-162). LT. STRAIT was informed of the decision by a letter from Lt. Col. Vawter, dated the same day, which vaguely summarized the reasons for the decision (Respondents' Exhibit A-1).

This judicial proceeding challenging that administrative action was thereupon commenced.

Summary of Argument

The general question presented by this petition for certiorari is the jurisdictional basis for federal court review of military administrative determinations affecting the constitutional and statutory rights of reserve soldiers. LT. STRAIT relied upon several jurisdictional statutes, all of which were pleaded below: 1) Habeas Corpus under 28 U.S.C. §2241; 2) Mandamus under 28 U.S.C. §1361; 3) Ad-

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RCPC, who is delegated the power to make final decisions. (AR 135-25, para. 7(i).) The Review Board thus has a function somewhat similar to the old Department of Justice Conscientious Objector Section which, under the pre-1967 Selective Service Act, reviewed applications for I-O classifications and hearing officers' summaries and made findings and recommendations based thereon to State Appeal Boards.

ministrative Procedure Act under 5 U.S.C. §§701-703; and 4) Federal Question under 28 U.S.C. §1331(a).

The habeas corpus jurisdictional issues raised in this case arise, as the Court of Appeals correctly noted in its now-vacated opinion of February 17, 1971, because recent cases of the Supreme Court expanding the availability of habeas corpus have created "a whole new class of petitioners, many of whom, like appellant, may be in custody in a state other than that in which the respondent is located" (Appendix A2 at 48). See also, *United States ex rel. Meadows* v. *New York*, 426 F.2d 1176, 1181 (2d Cir. 1970).

The situation is further exacerbated because the Habeas Corpus statute 28 U.S.C. §2241 is ambiguous as to the time and space limitations of custody, making uncertain the territorial jurisdiction of courts to grant writs of habeas corpus. This ambiguity exists no doubt because the statute in question was enacted prior to the Supreme Court's habeas-expanding decisions. As a result, Congress could not have contemplated situations like that presented herein where the petitioner and "custodian" are located in different states. This Court has expressly withheld judgment on the problem thus posed. *Nelson* v. *George*, 399 U.S. 224, 228 n. 5 (1970).

The Court is confronted here with a question of either personal jurisdiction or venue, the exact nature of the problem having divided the lower federal courts. Compare, *United States ex rel. Rudick* v. *Laird*, 412 F.2d 16 (2d Cir. 1969) [personal jurisdiction] and *Word* v. *North Carolina*, 406 F.2d 352 (4th Cir. 1969) [venue]. Both respondents and the court below concede that subject matter jurisdiction exists. The question thus is not whether a forum exists, but where.

The mandamus issues arise from the narrow definition of the scope of mandamus jurisdiction adopted by the Ninth Circuit in *Jarrett* v. *Resor*, 426 F.2d 213 (9th Cir. 1970), and the adoption of an "extraordinary writ" rule in the instant case by analogy to mandamus against judges. The *Jarrett* doctrine undercut much of the intent of Congress when it enacted 28 U.S.C. §1361, and the further embellishments adopted hereinbelow gutted virtually all of what remained. Under the tests now in force in the Ninth Circuit the availability of administrative mandamus is virtually non-existent. Moreover, the court has also neatly emasculated the expansive territorial provisions of 28 U.S.C. §1391(e), having forced a significant class of cases involving administrative review into one or two isolated federal judicial districts.

Jurisdiction under the Administrative Procedure Act was pleaded in the district court, but the question was not reached in view of its holding that it had habeas corpus jurisdiction. Nor was the issue argued or fully briefed in the Court of Appeals. Nevertheless, in the intervening period this Court decided *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), which casts an entirely new light on the question. Depending on its resolution of the habeas corpus and mandamus issues, LT. STRAIT asks that this Court review the decision below in light of *Overton Park*.

The questions raised under the federal question heading are likewise substantial and also recurring, including as they do the troublesome question as to the effect of the $10,000 jurisdictional amount provision of 28 U.S.C. §1331 in cases raising substantial constitutional issues.

All the issues are of a recurring nature raising substantial questions of federal law which have divided the lower federal courts.[5]

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[5] As noted in fn. 3, delayed active duty Army officers number in the thousands. Moreover, in recent years the number of members of the military seeking judicial review of denials of requests for conscientious objector discharge has "mushroomed". Hansen, *Judicial Review of In-Service Conscientious Objector Claims*, 17 U.C.L.A. L. Rev. 975, 976 (1970). Questions involving jurisdiction of federal district courts to review such claims of reservists have arisen in following reported cases:

1. JURISDICTIONAL RULINGS FAVORABLE TO PETITIONER

a. *Non-Unit Reservists*

Strieb v. *Gasiewicz*, 3 SSLR 3729 (7th Cir. 1970); *United States ex rel. Armstrong* v. *Wheeler*, 321 F. Supp. 471 (E.D. Pa. 1970); *United States ex rel. Wirtz* v. *Sheehan*, 319 F. Supp. 146 (E.D. Wis. 1970); *Donigian* v. *Laird*, 308 F. Supp. 449 (D. Md. 1969); *Nason* v. *Secretary of the Army*, 304 F. Supp. 422 (D. Mass. 1969); *Berman* v. *Resor*, 302 F. Supp. 1200 (N.D. Cal. 1969); *United States ex rel. Olsen* v. *Laird*, 3 SSLR 3774 (M.D. N.C. 1970); *Decker* v. *Wheeler*, 3 SSLR 3286 (D. Minn. 1970).

b. *Unit-Assigned Reservists*

Hammond v. *Lenfest*, 398 F.2d 705 (2d Cir. 1968); *Silberberg* v. *Willis*, 306 F. Supp. 1013 (D. Mass. 1969), *reversed on other grounds*, 420 F.2d 662 (1st Cir. 1970); *Morin* v. *Grade*, 301 F. Supp. 614 (W.D. Wis. 1969); *United States ex rel. Day* v. *Laird*, 3 SSLR 3571 (M.D. N.C. 1970).

2. JURISDICTIONAL RULINGS UNFAVORABLE TO PETITIONER

a. *Non-Unit Reservists*

United States ex rel. Conrad v. *Laird*, 318 F. Supp. 1329 (E.D. Wis. 1970); *McKay* v. *Secretary of the Air Force*, 306 F. Supp. 1252 (D. Mass. 1969).

b. *Unit-Assigned Reservist*

United States ex rel. O'Hare v. *Eichstadt*, 285 F. Supp. 476 (N.D. Cal. 1967).

Cf. also, *United States ex rel. Greenwood* v. *Resor*, 439 F.2d 1249, 1252 n. 5 (4th Cir. 1971); *United States ex rel. Hutcheson* v. *Hoffman*, 439 F.2d 821 (5th Cir. 1971); *Metz* v. *United States*, 304 F. Supp. 207 (W.D. Pa. 1969).

ARGUMENT

I.

Habeas corpus jurisdiction.

LT. STRAIT argued, albeit unsuccessfully, in the Court of Appeals that on its face *Schlanger* v. *Seamans*, —— U.S. —— (1971), did not compel a dismissal of his action. Rather he contended, and still contends, that the two cases are factually and legally distinguishable in several critical respects. Indeed, in its February 17 opinion the Court of Appeals had expressly distinguished the instant case from *Jarrett* v. *Resor*, 426 F.2d 213 (9th Cir. 1970); whereas *Schlanger* had been affirmed by the 9th Circuit in a brief per curiam opinion relying solely on *Jarrett*. *Schlanger* v. *Seamans*, 3 SSLR 3323 (9th Cir. 1970).

Furthermore, LT. STRAIT's contentions and the Court of Appeals initial ruling on the habeas corpus jurisdictional question derive support from the line of cases cited in note 5, *supra* at 1a. This line of cases was known to the Supreme Court when it decided *Schlanger*. In fact in *Schlanger* the high Court twice cited *Donigian* v. *Laird*, 308 F. Supp. 449 (D. Md. 1969), which has come to be known as the leading case in support of LT. STRAIT's position.[6]

Nevertheless, the Court did not disapprove that line of decisions, which it easily could have done, but clearly left the door open for later consideration in an appropriate case. LT. STRAIT now presents that case, and urges that the Court distinguish *Schlanger* and permit habeas corpus

[6] The Solicitor General also recognized the existence of *Donigian* and expressed qualified acceptance of it. *Schlanger* v. *Seamans*, *supra*, Brief of Respondents in Opposition to Petition for Writ of Certiorari 5.

jurisdiction in the district of a military reservist's residence and domicile. The critical factual and legal distinctions forming the basis for such a decision follow.

A. Schlanger *Is Factually Distinguishable.*

Sgt. Schlanger was on active military duty in the Air Force when he filed his petition for a writ of habeas corpus. He was assigned to a specific and functioning unit at Moody Air Force Base, Georgia, where he had actually been present and performing duties shortly before he commenced his action. 91 S.Ct. at 996; Brief of A.C.L.U. as Amicus Curiae at 3. He had been permitted a temporary leave from his unit of 70 days duration in order to attend a summer session at the University of Arizona, and he was under orders to report back to Moody AFB. 91 S.Ct. at 996, n. 1. Sgt. Schlanger had no contact whatsoever with Air Force personnel in Arizona at the time he filed his action. 91 S.Ct. at 997.

Contrast LT. STRAIT, on the other hand—an inactive reserve officer who was not even required to attend monthly drills. He was assigned to no functioning unit; rather, his military file was maintained at a centrally located, national, record-keeping center. He permanently resided, without interruption, from the day he became a member of the military to the day he filed his action, in San Francisco within the Northern District of California. All of his contact with the Army occurred within the Northern District of California, either by mail or directly with military personnel under the command of the Commanding General of the Sixth Army at the Presidio of San Francisco. LT. STRAIT's few sorties onto a military base for military purposes were limited exclusively to visits to Army bases

within the Northern District of California. In short, if LT. STRAIT has a "duty station" at all it is at his place of residence.

These factual distinctions have independent legal significance which will be discussed *infra*.

B. *Active Duty v. Reservist.*

The difference between active servicemen and reservists has often been considered an important legal distinction in military habeas corpus cases.

When these cases first appeared in the courts, the government contended that reservists, unlike those on active duty, were not "in custody." This argument was disposed of in the watershed case of *Hammond* v. *Lenfest,* 398 F.2d 705 (2d Cir. 1968), and it has not appeared since. In fact, the government has now come full circle and presently argues that no realistic differences exist at all between the custody status of reservists (including those on inactive status) and active servicemen.

The truth lies in between,[7] a reality which has been consistently recognized by the courts that have ruled on the jurisdictional question raised here. See authorities cited in note 5, *supra*. There are numerous significant reasons for the recognition of this legal distinction.

Normally there will be little doubt as to the precise location of the active serviceman's duty station. To the extent there is confusion, it will probably have resulted from

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[7] For example, para. 7 of AR 135-25, the Army's C.O. discharge regulation applicable only to reservists, speaks of "[c]ommanders having custody of the member's records . . . ," as opposed to custody of the individual *per se*.

a voluntary departure on the part of the petitioner. E.g., *Schlanger* v. *Seamans, supra; Jarrett* v. *Resor, supra.* Lt. Strait, by contrast, although he temporarily departed San Francisco to attend law school, had returned to his permanent residence, and hence his "duty station" at the time he filed this action.

Nevertheless, because his custodial status is extremely loose, it may be impossible to ascertain with certainty what district, if any, is the locus of his custody. Upon departing his place-of-residence "duty station," he became a mere volunteer: a "forum shopper," albeit a reluctant one.

Furthermore, the active serviceman will not necessarily be inconvenienced by having to bring the action in the district where his duty station is located,[8] whereas the reservist may be forced to suffer considerable hardship in order to obtain a forum. See, *Berman* v. *Resor,* 302 F. Supp. 1200, 1202 (N.D. Cal. 1969).

This latter result will be especially true if, in the last analysis, the various jurisdictional hurdles create a no-man's land, or create barriers to judicial relief based on financial hardship, which force some reservists to report for active duty in order to establish the requisite custodial relationships for habeas corpus purposes. Cf., *Ahrens* v. *Clark,* 335 U.S. 188 (1948). Such a result will cause the Great Writ to become the static, formalistic remedy, disapproved in *Schlanger* itself. 91 S.Ct. at 998, n. 5.

More importantly, the Constitution provides that "the privilege of the Writ of Habeas Corpus shall not be sus-

[8] It is hard to conceive how Sgt. Schlanger, for example, could have been terribly inconvenienced by being required to return to Georgia and file his suit there.

pended. . . ." Article I, §9. Needless exaltation of form over substance may lead to that result in these cases at critical points in time, while offering no additional benefit to the government in its ability to respond.

C. *The Commanding Officer of the Reserve Personnel Center Was "Present" in the District for Purposes of Habeas Jurisdiction.*

In its February 17 opinion, the Court of Appeals concluded that as a result of his substantial contacts with the petitioner in the district (contacts pertaining to the very issues before the Court), the Commanding Officer of the Reserve Personnel Center was "sufficiently present [in the district] to be subject to the jurisdiction of that court" (Appendix A2 at 48). Accord: *Donigian* v. *Laird, supra; United States ex rel. Armstrong* v. *Wheeler,* 321 F. Supp. 471 (E.D. Pa. 1971).

In *Schlanger* the Supreme Court noted this method of resolving the personal jurisdiction question but did not rule on it. 91 S.Ct. 997. The Court no doubt felt that this approach (which is a derivative of the "contacts" theory of personal jurisdiction long applied in non-habeas civil litigation, *e.g., McGee* v. *Int'l Life Ins. Co.,* 355 U.S. 220 (1957), and *Int'l Shoe Co.* v. *Washington,* 326 U.S. 310 (1945)) should not be ruled upon in a case that did not present the issue. In fact, the *Schlanger* opinion carefully noted the complete lack of any contact between Sgt. Schlanger and Air Force officers in Arizona. 91 S.Ct. 997-8.

D. *LT. STRAIT Was Not Forced to Rely Upon 28 U.S.C. §1391(e) to Obtain Personal Jurisdiction.*

The Supreme Court in *Schlanger* noted that the only manner in which Sgt. Schlanger could serve process on any appropriate respondent was by use of 28 U.S.C. §1391(e),

and it further noted that, in its opinion, §1391(e) was not intended to extend habeas corpus jurisdiction. 91 S.Ct. 997, n. 4.

Unlike Sgt. Schlanger, however, LT. STRAIT did not exclusively rely upon §1391(e), for he personally served the Commanding General of the Sixth Army within the confines of the district court's territorial jurisdiction (R 108). He contends that said officer is an appropriate respondent being an integral part of LT. STRAIT's chain of command.

Subordinates of the Sixth Army Commander acted on behalf of the RCPC throughout LT. STRAIT's Army tenure, but especially and extensively in connection with the C.O. application which was the subject of the action in the district court. AR 135-25 provides that "[a]rea commanders will provide assistance upon request from the Commanding Officer, U.S. Army Reserve Components Personnel Center . . . to arrange for necessary interviews of non-unit reservists residing in their geographical area of *jurisdiction*." Para. 7.c. [Emphasis added:] Thus the Army recognizes by its choice of words the decentralized nature of its control over petitioner and others similarly situated.

The Army thus admits that for its purposes of control and administration, LT. STRAIT was within the jurisdiction of local area commanders, but apparently now denies that those area commanders are within the jurisdiction of a co-extensive district court when the same reservist seeks the court's aid vis-a-vis the very same activities carried on in the district. The subordinates of said area commander are the only military personnel with whom LT. STRAIT has ever had any personal contact. The officers at the Reserve Personnel Center have always contented them-

selves with communication with LT. STRAIT by mail or through 6th Army personnel, although they now object to that privilege flowing both ways.

Accordingly, the area commander (Lt. Gen. LARSEN) must be considered a necessary respondent, being an integral part of the chain of command, or he must be considered an agent for service of process of LT. STRAIT's ultimate commanding officer, who, having entered the district for some purposes, remains subject to the court's process in a case relating to those activities. Cf., *Ex Parte Endo*, 323 U.S. 283 (1944).

E. *Summary.*

For all of the above reasons, it is possible to meaningfully distinguish *Schlanger* v. *Seamans, supra,* from the instant case. The practical realities of the situation also dictate such a result. The great purposes of the writ of habeas corpus, one of which is its immediacy as a remedy, Developments, "Federal Habeas Corpus," 83 HARV. L. REV. 1038, 1040 (1970), must not be frustrated by meaningless and unreal quibbles over personal jurisdiction.

If the issues here are tested in terms of the policy considerations behind the Congressional enactment, the Army's contentions are completely drained of any viability. The importance of obtaining personal jurisdiction over respondents in habeas proceedings is to protect against *ex parte* determinations. The parties must have actual notice and an opportunity to be heard in order to satisfy the due process clause. *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914). In the instant case there can be no suggestion that the Army did not have actual, sufficient notice of the proceedings, nor that it did not have a meaningful opportunity to

be heard, nor that the Northern District of California was an inconvenient forum; indeed, it responded promptly and vigorously and was effectively represented. There likewise can be no suggestion that its ability to respond would be meaningfully enhanced by requiring LT. STRAIT to bring the action elsewhere, while all must agree that LT. STRAIT would be greatly disadvantaged thereby.

In short, the result below clearly violates the enjoinder of Judge Northrop in *Donigian* v. *Laird*, 308 F. Supp. at 452, *supra*, that "[f]orm in this instance cannot prevail over substance."

II.

Mandamus jurisdiction.

LT. STRAIT also pleaded jurisdiction pursuant to 28 U.S.C. §§1361 and 1391(e), both for the purpose of reviewing the ultimate decision on the merits (which he alleged was contrary to the regulatory criteria and without basis in fact) and for the purpose of reviewing his allegations that his application was processed in a manner contrary to regulations. The Court of Appeals implicitly rejected the first basis of jurisdiction, apparently in reliance on *Jarrett* v. *Resor*, 426 F.2d 213 (9th Cir. 1970). It conceded that limited mandamus jurisdiction existed to review the procedural irregularities, *Feliciano* v. *Laird*, 426 F.2d 424 (2d Cir. 1970); *Schatten* v. *United States*, 419 F.2d 187 (6th Cir. 1969) but it held that the exercise of that jurisdiction was not appropriate in this case.

With respect to habeas corpus jurisdiction, the court below purported to follow the recent decision of this Court

in *Schlanger* v. *Seamans, supra,* although only this Court can resolve the question whether its reliance on *Schlanger* was correct. In the mandamus area, however, the Court of Appeals struck out into new fields of endeavor, fashioning rules of law regarding mandamus jurisdiction under 28 U.S.C. §1361 that have no support in authority and severely undermine the intent of Congress. Furthermore, even its application of its own newly adopted rules was incorrect in the case at hand.

The substantial issues thus raised are discussed in some detail hereinbelow.

A. *The Ninth Circuit's View of the Scope of Review Under §1361 Is Erroneous.*

The Court of Appeals stated, without expressing its reasoning, that the District Court could not have granted complete relief to LT. STRAIT pursuant to its mandamus jurisdiction (Appendix A1 at 42). This assumption apparently derives from the Ninth Circuit's earlier ruling in *Jarrett* v. *Resor,* 426 F.2d 213, *supra,* that 28 U.S.C. §1361 is not available to test on the merits a denial by the military of a request for conscientious objector discharge. In *Jarrett* the Court held that in such a case the duty owed to the petitioner is not "ministerial" in nature and hence not subject to review in mandamus.

The Ninth Circuit's view of the scope of mandamus jurisdiction rests on a dubious reading of Congressional policy and is in conflict with decisions in other circuits and districts. See e.g., *Bluth* v. *Laird,* 435 F.2d 1065 (4th Cir. 1970); *United States ex rel. Schonbrun* v. *Commanding*

Officer, 403 F.2d 371 (2d Cir. 1968); *Ashe* v. *McNamara,* 355 F.2d 277 (1st Cir. 1965); *United States ex rel. Clements* v. *Laird,* 3 SSLR 3863 (D. Md. 1971); *United States ex rel. Olsen* v. *Laird,* 3 SSLR 3774 (M.D. N.C. 1970). Moreover, its use and application of the terms "ministerial" and "discretionary" are open to serious question.

In the Mandamus and Venue Act of 1962, 28 U.S.C. §§1361 and 1391(e), Congress greatly expanded the power of the federal district courts to review claims by individuals that officials or agencies of the government had violated their legal rights by failing to act in accordance with prescribed law. Some commentators have argued that Congress intended to expand the scope of judicial review of federal agency actions. E.g., Byse and Fiocca, *"Section 1361 of the Mandamus and Venue Act of 1962 and 'Nonstatutory' Judicial Review of Federal Administrative Action,"* 81 HARV. L. REV. 308 (1967).

There can be no question that Congress intended to make it easier and more convenient for citizens to challenge alleged illegal government actions in the courts, as well as to ease the burden on certain districts where certain classes of cases could exclusively be maintained theretofore. Senate Report No. 1992, accompanying H.R. 1960, 1962 U.S. Code Cong. and Adm. News 2785. Nor can there be any question that the result below defeats both purposes of Congress, since it makes it harder for a citizen like LT. STRAIT to sue the Army by requiring him to initiate action in a distant state, while at the same time concentrating these cases in the districts where military administrative centers are located.

Although members of Congress were concerned that §1361 would not permit the district courts to interfere with

decisions ordinarily entrusted to agency discretion, Senate Report 1992, *supra* at 2787, it is often difficult to draw the line between discretionary and non-discretionary actions, especially where the interpretation of statutes and regulations is concerned. As the court said in *Ferry* v. *Udall*, 336 F.2d 706, 711 (9th Cir. 1964), "We recognize the intrinsic difficulty in determining whether a discretionary action of an agency is reviewable."

Moreover, the limitations on review of discretionary actions have always been understood not to restrict court review where discretion is abused, either substantively or procedurally. L. Jaffe, *Judicial Control of Administrative Action*, 363 (1965). See also, *United States ex rel. Schonbrun* v. *Commanding Officer*; 403 F.2d at 374, *supra*.

Furthermore, when courts have stated that the mandamus provisions apply only to non-discretionary, "ministerial" acts, they have seldom, if ever, attempted to draw a careful definition of that term. To many, the descriptive term "ministerial" connotes a "rubber-stamp" function such as those performed by clerical employees who receive and process papers for the benefit of those who make the discretionary decisions. But this surely is not the scope intended by Congress or by the courts who have interpreted §1361. Although the language in opinions often belies it, most courts would readily admit that the issue is much more subtle. In fact, Prof. Jaffe suggests that "the notion that each administrative decision can be classified a priori either as 'ministerial' or 'discretionary' is unsound and unworkable." JAFFE, *supra* at 181.

Thus, although the secretary of the department would appear to have wide discretion in deciding whether or not

to discharge members of the service subject to his control and authority, there are limitations on his discretion—limits imposed by statutes, regulations, court decisions—and factual findings may be so overriding as to make his ultimate decision a foregone conclusion and, in any particular case, not one committed to discretion at all. It is this type of agency determination that has traditionally been subject to mandamus jurisdiction, even though some elements of interpretation of law and weighing of facts are present.

Again, the Ninth Circuit succinctly summarized the issue in *Ferry* v. *Udall, supra,* 336 F.2d at 713, as follows:

> "The discretion of the Secretary is limited to deciding whether these requirements have been met. Judicial review . . . is available, since it would be anomalous to allow [an applicant] to lose rights, the conferring of which is made mandatory by the applicable statute, merely because . . . the Department . . . made erroneous or arbitrary decisions. . . ."

This formula is, of course, a reiteration of the basic formula for mandamus expressed nearly a half century ago by Chief Justice Taft in *Work* v. *United States ex rel. Rives,* 267 U.S. 175, 177-78 (1925). See also, *Roberts* v. *United States,* 176 U.S. 221 (1900).

An agency or official may indeed be given unbridled discretion in certain decision-making areas by virtue of statute or regulation. E.g., *United States* v. *Walker,* 409 F.2d 477 (9th Cir. 1969). Such pure discretionary powers are usually so obvious as to be beyond debate, and moreover, Prof. Jaffe warns us that such absolute discretion is "excep-

tional." JAFFE, *supra* at 181. But once Congress by statute, or the agency by rule, establishes rules to be followed, any action thereunder is reviewable by mandamus if it has clearly failed to follow the established criteria. *McKay* v. *Wahlenmaier*, 226 F.2d 35, 47 (D.C. Cir. 1955); *Carey* v. *Local Board No. 2*, 297 F. Supp. 252 (D. Conn.), *aff'd*, 412 F.2d 71 (2d Cir. 1969).

The failure of an agency to correctly apply the statutory or regulatory criteria as an object of mandamus relief has been eloquently urged by Prof. Jaffe, as follows:

> "Before a court can decide that an official 'has discretion' whether or not how to act, it must decide what relevant discretion has been granted. This decision will rest on an interpretation or construction of the statute conferring the power. Under our constitutions and our common law the courts have the power to determine the legality of administrative action. This is the power to decide the rule of law which defines the granted area of discretion.
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> "In short the officer may have discretion, not only to find the facts, but to choose the law. This means that he may make a choice which the court might not itself have made as an original proposition. But if a court is convinced that the rule chosen by the officer is clearly contrary (in its opinion) to the statutory purpose, then it will order the officer to act according to its view of the law; it will not and should not desist merely because in a general sense the officer has discretion. He has exercised his discretion contrary to law and in this sense he has violated a clear duty." JAFFE, *supra* at 181-2 and 183-4.

This approach would certainly seem to make mandamus available to review in-service denials of requests for discharge, especially if the courts are going to insist on applying the "basis in fact" test in such cases. When the agency decision is tested under the basis in fact standard of review the possible infringement upon agency discretion becomes nil. Often cases involve a determination as to whether the uncontested facts compel a result favorable to the aggrieved serviceman under the regulatory scheme. In other words, if there is "no basis in fact" for the denial of the claim, then it can be said that the agency owed a duty to the plaintiff to grant the requested relief, and abused its discretion by failing to act accordingly. Cf., *Estep* v. *United States,* 327 U.S. 114 (1946); see also, JAFFE, *supra* at 366-7 and 374.

Such a view of "discretionary actions" and their amenability to judicial review has recently been approved by the Supreme Court in *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 410 (1971).

The Ninth Circuit's position on mandamus jurisdiction, as expressed in *Jarrett* v. *Resor, supra,* appears to be based on a view of administrative discretion that is contrary to the general view described above. Moreover, its position has the effect of seriously undercutting the purposes behind the enactment of 28 U.S.C. §1361.

B. *The Court of Appeals Improperly Confused Judicial Mandamus With Administrative Mandamus.*

The court below held that "[m]andamus is an extraordinary remedy which is to be utilized only in the most urgent cases," paraphrasing *Ex Parte Collett,* 337 U.S. 55, 72 (1949) (Appendix A1 at 42). The precise language in

the cited case is as follows: "Mandamus prohibition and injunction *against judges* are drastic and extraordinary remedies. . . ." [Emphasis added.] *Cmax Inc.* v. *Hall*, 300 F.2d 265 (9th Cir. 1962), and *Pacific Car and Foundry Co.* v. *Pence*, 403 F.2d 949 (9th Cir. 1968), also cited by the court, are likewise cases involving mandamus against judges.

Careful analysis of the cases cited by the Court of Appeals reveals that there is a critical distinction between judicial mandamus and administrative mandamus. Mandamus against judges truly lies within the "sound discretion" of the courts, after considering such factors as relative hardship to the parties, misuse of judicial resources, etc. *Pacific Car and Foundry Co.* v. *Pence*, 403 F.2d at 952-3, *supra*.

Administrative mandamus against federal agencies or officials under 28 U.S.C. §1361 is much less committed to judicial discretion. Although it too is referred to as an extraordinary remedy, the "discretion" of the courts to refuse to grant the remedy is severely limited. Once the court determines that there is a clear showing of erroneous official action and that administrative remedies have been exhausted, the court can only refuse to grant relief if it finds that another adequate remedy exists.[9] *Hancock* v. *Laird*, 415 F.2d 234, 236 (9th Cir. 1969).

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[9] *Whitehouse* v. *Ill. Cent. R. Co.*, 349 U.S. 366 (1955), cited by the court below is not to the contrary and is inapposite as well. The court there was concerned with the irreparable harm criteria associated with injunctive relief, and moreover, it was unable to find a clear showing of erroneous official action inasmuch as administrative remedies had not been exhausted. Here administrative remedies have been exhausted and the threat of irreparable harm is clear.

Here the Army had a clear duty 1) to process LT. STRAIT's application in accordance with its own regulations and 2) to grant his request unless a basis in fact existed to justify a denial of his request for discharge. See, *Negre* v. *Larson*, 401 U.S. 437 (1971); *United States ex rel. Donham* v. *Resor*, 436 F.2d 751 (2d Cir. 1971). Its failure to do either in this case constitutes a clear showing of erroneous official action (as found by the Court of Appeals in its February 17 opinion [Appendix A2 at 53]). As such it is amenable to judicial relief in the nature of mandamus. 28 U.S.C. §1361.

Even if the court was correct, however, it failed to exercise that discretion, or more properly, to remand the proceedings to the district court for its exercise of discretion.

In the cases cited by the court, the factors to be weighed in the exercise of sound discretion included the relative harm to be suffered by the parties and the possibility of duplicative litigation, the possibility of irreparable injury and miscarriage of justice. *Pacific Car and Foundry Co.* v. *Pence*, 403 F.2d 949 (9th Cir. 1968); *Cmax Inc.* v. *Hall*, 300 F.2d 265 (9th Cir. 1962).

Many, if not all, of these criteria can be found in this case indicating that "extraordinary" relief should be granted.

1. LT. STRAIT faces the irreparable injury of either reporting for military duty contrary to his belief of conscience or subjecting himself to the harsh, military penal domain.

2. LT. STRAIT has already litigated this case at great expense both at the district court and court of appeals

level and both courts have rendered decisions on the merits. To require him to start again from scratch in another district is most certainly a waste of judicial resources and an overbearing imposition on the litigants to the action.

3. In two thoughtful and thorough opinions, a three-judge panel of the court of appeals unanimously found there was no basis in fact for the Army's decision. Under the present opinion LT. STRAIT must now subject himself to determination anew by a single district judge who may see the matters from a different perspective and rule in an opposite manner. This would certainly be a miscarriage of justice.

4. Respondents could seek a change of venue if they are inconvenienced, as the court below noted (Appendix A2 at 48, n. 4). Moreover, their adherence to the waivable personal jurisdiction objection on rehearing herein reveals their motives as the real "forum shoppers" in these cases.

5. Finally the hardship on LT. STRAIT in the context of this case warrants resort to extraordinary remedies. The particular hardship and the court's assumption that another adequate remedy exists will be discussed in more detail below.

The Court of Appeals' casual, and highly inaccurate, treatment of the "sound discretion" to be exercised by courts in administrative mandamus cases was itself an error of significant proportion. Moreover, the court heard no argument and permitted only tentative briefing (Response to Petition for Rehearing) on the issues thus disposed of. For this reason alone the judgment should be vacated and the cause remanded for further proceedings.

C. *The Existence of Possible Habeas Corpus Jurisdiction in a Distant District Is Not Another Adequate Remedy.*

While it is true that under certain limited circumstances, a court may decline to exercise mandamus jurisdiction, if it finds that another adequate remedy exists, *Carter* v. *Seamans,* 411 F.2d 767 (5th Cir. 1969), that doctrine carries its own limitations. Those limitations go to the question whether or not the other remedy is really "adequate".

1. Does the Other Remedy Truly Exist?

A first and obvious criterion would be a determination that the alternate remedy exists beyond question—that no new jurisdictional objection can be raised to it. See, *Carter* v. *Seamans, supra.* Here the Court of Appeals merely indicated that LT. STRAIT "*may* obtain relief by habeas corpus in Indiana. . . ." (Appendix A2 at 42 [emphasis added]). The Court obviously could not say with any assurance that the district court in Indiana would find LT. STRAIT in custody in Indiana in view of his lack of any physical presence there. See, *Nelson* v. *George,* 399 U.S. 224, 228 n. 5 (1970); *Ahrens* v. *Clark,* 335 U.S. 188 (1948).

Second, the alternate remedy referred to must be a remedy at law for which venue would clearly exist under 28 U.S.C. §1391(e) and not another extraordinary, equitable remedy.[10] Indeed, the very history behind the enactment of 28 U.S.C. §1361 leads inescapably to that conclusion. When §1361 was enacted, citizens already had the remedy of suing in the District of Columbia when official acts were challenged. §1361 did not abolish actions in the

[10] In fact in *Carter* v. *Seamans, supra* at 771, the other remedy, i.e., an action in the Court of Claims, was once the *exclusive* remedy for the cause of action, although by later amendment the remedies were designated as "concurrent."

District of Columbia, but merely added a new, alternative remedy.

Nevertheless, the Ninth Circuit's position would virtually abolish §1361 for all intents and purposes since, in its view, the existence of another adequate remedy, i.e., common law mandamus in the District of Columbia, will always make the exercise of §1361 jurisdiction "inappropriate".

In *United States ex rel. Schonbrun* v. *Commanding Officer*, 403 F.2d 371 (2d Cir. 1968), the court expressed the view that mandamus and habeas corpus are mutually available. The court said:

> "Whether or not habeas corpus is available, the district court was free to treat the petition as one for mandamus under 28 U.S.C. §1361. . . ." 403 F.2d at 374.

Accord: *United States ex rel. Clements* v. *Laird*, 3 SSLR 3863, *supra*; *United States ex rel. Olsen* v. *Laird*, 3 SSLR 3774, *supra*.

Consequently, the Ninth Circuit's view of the law starkly conflicts with that of the Second Circuit and district courts in the Fourth Circuit.[11]

2. Is Habeas Corpus in a Distant State Adequate?

Finally, and perhaps most importantly, the Court of Appeals view of what is an *adequate*, alternative remedy,

[11] The above-cited decisions may have reflected a realization by those courts that a contrary result (*i.e.*, the result reached by the Ninth Circuit herein) would, in addition to creating hardships for the individuals concerned, create a situation of concentrating certain classes of cases in single districts—a result Congress has consistently sought to avoid both in various amendments to the Habeas Corpus Statute, 28 U.S.C. §2241(d) and 28 U.S.C. §2255, and in the Mandamus and Venue Act of 1962, 28 U.S.C. §§1361 and 1391(e).

although unexpressed, leaves much to be desired. The court apparently assumes that petitioners, such as LT. STRAIT, are adequately served by having a habeas corpus remedy that *may* be available in a district several thousand miles from their residences.

Aside from the prohibitive cost which will be an effective bar to many persons, the carrying on of litigation in a distant forum has other drawbacks, including inability to obtain and consult with counsel, further inconvenience and hardship if an evidentiary hearing is required, and problems relating to timeliness of actions to be taken. This latter factor alone is sufficiently significant to warrant a finding that, in these cases, habeas corpus in a distant district is not an adequate remedy.

Reviews of denials of requests for discharge from the military are often brought under circumstances requiring immediate judicial action, either in the form of interlocutory relief or fast resolution of the merits in order to prevent harm of an irreparable nature. This case is an example.

LT. STRAIT's request for discharge was denied April 7, 1970, and he was notified of that fact by a letter dated the same day, and by which he was also informed that he would be expected to comply with orders to report for active duty on April 13, 1970 (Respondent's Exhibit A at 1). He thereupon filed this action in the district court and obtained a restraining order on April 10, 1970 (R 106).

The case was then heard, and an order denying the petition was entered July 28, 1970. Counsel immediately obtained a stay of that order on July 31, 1970, in order to seek reconsideration in the district court or an injunction pending appeal (R 232). Both motions were denied on August 4, 1970, but the restraining order was extended 10

days to permit an application for stay to the Ninth Circuit (R 251).

The Army then re-ordered LT. STRAIT to report for active duty on August 17, 1970, and LT. STRAIT filed an application for a stay of those orders with the Court of Appeals, but the Court declined to enjoin his activation in an order entered on August 14, 1970, a Friday, at 4:45 P.M. LT. STRAIT then presented an application to Mr. Justice Douglas at Goose Prairie, Washington, on August 16, 1970, which the Justice granted.

Needless to say the ability of counsel to communicate and consult with his client and to thereafter take appropriate action in fast-moving situations such as that described would be greatly hampered if a distance of several thousand miles separated them. Unless habeas corpus remedies can be utilized in this quick manner the remedy is inadequate, if not non-existent.

It has been said that the greatness of the writ of habeas corpus is that it "afford[s] a swift and imperative remedy in all cases of illegal restraint or confinement." *Secretary of State for Home Affairs* v. *O'Brien,* (1923) A.C. 603, 609, quoted in *Federal Habeas Corpus,* 83 HARVARD L. REV. 1038, 1040 (1970). The Supreme Court has likewise cautioned that the Great Writ "is not now and never has been a static, narrow, formalistic remedy. . . ." *Jones* v. *Cunningham,* 371 U.S. 236, 240 (1963).

Nevertheless, the result reached by the Court of Appeals frustrates these grand purposes. The Court not only has taken a very inflexible position as to the territorial availability of the writ, but it has also closed the door to alternate remedies, making the use of the writ in these cases

truly available only to petitioners with both leisure and money at their disposal.

LT. STRAIT believes this result is untenable.

D. *Summary.*

LT. STRAIT contends that the Ninth Circuit incorrectly held that mandamus is not available and that its holding is in conflict with decisions of other circuits. While he alternately contends that the court also incorrectly applied *Schlanger* v. *Seamans, supra,* to his habeas contentions, he also contends that if this Court agrees that *Schlanger* was correctly applied, it must turn to the Court of Appeals' disposition of the mandamus contentions and determine if they were correctly decided.

Because many persons similarly situated to LT. STRAIT will be unable to utilize habeas corpus if the Ninth Circuit's view prevails, its resolution of the mandamus issues are of overriding importance and significance to a substantial class of litigants. Furthermore, while *Schlanger,* by its nature will affect only review of military administrative determinations, the Ninth Circuit's mandamus formula has a broad sweep with serious implications in many areas, particularly the possibility that its formula may have obliterated meaningful use of 28 U.S.C. §1361.

III.

Other jurisdictional statutes.

A. *Review Pursuant to the Administrative Procedure Act.*

The federal district courts have power to "hold unlawful and set aside agency action, findings, and conclusions found to be 1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." 5 U.S.C. §702. Certainly this describes review of a decision by the Army denying without any basis in fact a request for conscientious objector discharge. Although certain actions by military agencies are exempted from this provision, *e.g.*, courts martial and decisions made in the field in time of war or in occupied territory, 5 U.S.C. §701(1)(F) and (G), the exceptions are not applicable here.

Doubts as to whether the A.P.A. is "jurisdictional" now appear to have been settled. *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 410 (1971). The Supreme Court's decision there followed a long line of cases that strongly hinted at this result without expressly reaching it. See, *Barlow* v. *Collins,* 397 U.S. 159 (1970); *Data Processing Service* v. *Camp,* 397 U.S. 150 (1970); *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967); *Brownell* v. *We Shung,* 352 U.S. 180 (1956).

The Court in *Overton Park* stated that the A.P.A. created a presumption in favor of judicial review to be overcome only by an explicit statutory exclusion. 401 U.S. at 410. Moreover, the fact that other remedies may exist, *e.g.*, habeas corpus, does not defeat jurisdiction under the A.P.A., for, as Prof. Jaffe has said, one function of the

A.P.A. is ". . . to provide an additional, more flexible remedy. . . ." JAFFE, *Judicial Control of Administrative Action,* 372-4 (1965). See also 5 U.S.C. §703.

The respondents may contend that the action under review herein is one "committed to agency discretion", 5 U.S.C. §701, but the Supreme Court noted in *Overton Park, supra,* that "[t]his is a very narrow exception . . . applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" 401 U.S. at 410.

Here the essence of LT. STRAIT's complaint is that the Army failed to follow clear regulatory commands in disposing of his request for discharge. The Army had no discretion to deny his request if he met the regulatory criteria and there was no basis in fact for its action. Moreover, to the extent that discretion exists, a denial of a claim without a basis in fact is an abuse of that discretion. See, *United States ex rel. Schonbrun* v. *Commanding Officer,* 403 F.2d 371, 374 (2d Cir. 1968); *Ferry* v. *Udall,* 336 F.2d 706, 713 (9th Cir. 1964); JAFFE, *op. cit.,* at 181-4.

B. *Federal Question Jurisdiction Pursuant to 28 U.S.C. §1331.*

28 U.S.C. §1331 grants jurisdiction to the district courts to hear and determine cases involving questions of federal law. The statute thus grants the district courts jurisdiction to review federal agency determinations. Only two criteria exist for pleading a non-diversity case under 28 U.S.C. §1331, as follows:

> "(1) [T]hat the required jurisdictional amount is present and (2) . . . that the complaint . . . presents a substantial federal question." 6A Moore, Federal Practice, para. 57.23, p. 3136 (1966).

Section 1331 has consequently been extensively used as the jurisdictional basis for suits challenging decisions of the Selective Service System prior to induction. See, *Breen* v. *Selective Service Board No. 16,* 396 U.S. 460 (1970); *Oestereich* v. *Selective Service System,* 393 U.S. 233 (1968); *Fein* v. *Selective Service System,* 430 F.2d 376 (2d Cir. 1970), *cert. granted,* 401 U.S. 953 (1971); *Wolff* v. *Selective Service Board No. 16,* 372 F.2d 817 (2d Cir. 1967); cf. also, *Berk* v. *Laird,* 429 F.2d 302 (2d Cir. 1970). This challenge to a highly analogous administrative decision of the Army, brought by a reservist about to be activated, creates a remarkably similar jurisdictional framework.

The only remaining issue is the question of jurisdictional amount. Many appellate courts have adroitly sidestepped the issue and have proceeded to the merits. E.g., *Breen* v. *Selective Service Local Board No. 16,* 406 F.2d 636, 637, n. 1 (2d Cir. 1969), *reversed on other grounds,* 396 U.S. 460 (1970).

LT. STRAIT agrees with Judge Edelstein in *Boyd* v. *Clark,* 287 F. Supp. 561, 568 (S.D.N.Y. 1968), *aff'd w/o reaching the jurisdictional amount question,* 393 U.S. 316 (1969), that freedom from interference with personal liberty as a result of an arbitrary governmental action "is inherently worth more than $10,000." Accord: *Cortright* v. *Resor,* 325 F. Supp. 797 (E.D.N.Y. 1971).

More importantly, however, LT. STRAIT pleaded the existence of an amount in controversy exceeding $10,000, and that allegation has never been contested. LT. STRAIT also stands ready to prove the existence of potential damages in excess of $10,000 in the event the case should be

remanded to the district court to proceed pursuant to 28 U.S.C. §1331. Cf. *Oestereich* v. *Selective Service System, supra; Berk* v. *Laird,* 429 F.2d 302, 306 (2d Cir. 1970).

IV.

Conclusion.

This case raises several substantial questions of federal law which will affect many persons who are, or may become, adversely affected by administrative decisions of the military services. With respect to most of these questions, the Ninth Circuit's positions vary substantially from those of other circuits and districts, which have followed a much more flexible approach in these cases.

For these reasons petitioner urges that a Writ of Certiorari to the Ninth Circuit Court of Appeals be granted in order that this Court may review and determine these questions.

Dated:

Respectfully submitted,

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APPENDIX A1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 26,289

LIEUTENANT JOHN A. STRAIT,

Petitioner-Appellant,

—v.—

MELVIN R. LAIRD, Secretary of Defense; STANLEY R. RESOR, Secretary of the Army; LIEUTENANT GENERAL STANLEY LARSEN, Commanding General, Sixth United States Army; MAJOR GENERAL PHILLIP B. DAVIDSON, JR., Commanding General, Fort Ord, California; COLONEL JOHN J. HOFFMAN, Commanding Officer, United States Army Reserve, Components Personnel Center, Fort Benjamin Harrison, Indiana,

Respondents-Appellees.

[June 4, 1971]

ORDER ON REHEARING

Before:

MERRILL and KOELSCH, *Circuit Judges,* and JAMESON, *District Judge**

* Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

Appellees' petition for rehearing is granted.

It is ordered that the opinion filed herein on February 17, 1971, is withdrawn and the judgment rendered is vacated and that in their stead the accompanying opinion and judgment will be filed.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Before:

MERRILL and KOELSCH, *Circuit Judges*, and JAMESON, *District Judge**

PER CURIAM:

By these proceedings in habeas corpus, appellant seeks judicial review of an administrative decision of the Department of the Army denying his request for discharge as a conscientious objector. This appeal is taken from judgment of the District Court for the Northern District of California denying, on the merits, the relief sought. A cross-appeal has been taken by appellees from that portion of the District Court's judgment holding that it had jurisdiction in habeas corpus. We do not reach the merits of appellant's appeal, for we conclude that on the cross-appeal of appellees judgment of the District Court must be reversed and the proceedings dismissed for lack of jurisdiction.

Appellant is an officer in the United States Army Reserve. He received his commission in 1966 on completion of the ROTC course at the University of California at Davis. He was then placed on a delayed reserve status in order to permit him to attend law school at Yale University, from which he graduated in 1969. Since he has not yet reported

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* Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

for active duty, appellant is attached to no unit. As a member of the army reserves, his activities are directed by the United States Reserve Components Personnel Center at Fort Benjamin Harrison, Indiana.

On January 20, 1970, appellant applied for discharge as a conscientious objector. Pursuant to army regulations the application was submitted to the Reserve Components Personnel Center. Since appellant was residing at his home in the Northern District of California, processing of the application by interviews and hearing was had at Fort Ord, California, and the record was then forwarded to Indiana for review by the Conscientious Objector Discharge Review Board. On the Board's recommendation the application for discharge was disapproved by the commander of the Personnel Center. This action followed.

Appellant argues that he is in custody within the territorial jurisdiction of the District Court below and, therefore, that that court had jurisdiction in habeas corpus. *Schlanger* v. *Seamans*, —— U.S. —— (March 3, 1971), compels us to disagree. Even if we concede that appellant is in custody within the jurisdiction of the District Court (which appellees dispute),[1] his custodian—the commander of the Reserve Components Personnel Center at Fort Benjamin Harrison—remains outside of the jurisdiction of that court. As stated in *Schlanger*: "Hence, even if we assume that petitioner is 'in custody' in Arizona in the sense that he is subject to military orders and control which act as a restraint on his freedom of movement • • • the absence of his custodian is fatal to the jurisdiction of the Arizona District Court."

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[1] This question the Supreme Court in *Schlanger* did not reach, although it noted the problem and cited *Donigian* v. *Laird*, 308 F. Supp. 449 (D. Md. 1969), on which appellant relies.

Appellant contends that, as an alternative to his habeas corpus theory, the District Court had jurisdiction in mandamus to require the army to process his application for discharge in accordance with regulations with which it has allegedly failed to comply. Mandamus is an extraordinary remedy which is to be utilized only in the most urgent cases. *See, e.g., Ex Parte Collett,* 337 U.S. 55, 72 (1949). Its issuance lies within the sound discretion of the court. *Cmax Inc.* v. *Hall,* 300 F.2d 265 (9th Cir. 1969); *see Whitehouse* v. *Ill. Cent. R. Co.,* 349 U.S. 366, 373 (1955). Since appellant asserts that the army's decision to deny him his discharge was without basis in fact, the mandamus remedy would not afford complete relief. *Cf., Pacific Car and Foundry Co.* v. *Pence,* 403 F.2d 949, 952-53 (9th Cir. 1958). Above all, since appellant may obtain relief by habeas corpus in the federal courts in Indiana, there exists another adequate remedy. *See Carter* v. *Seamans,* 411 F.2d 757 (5th Cir. 1969). For these reasons we feel that issuance of the writ in these circumstances would not be appropriate.[2]

Under the cross-appeal of appellees judgment is reversed and the matter remanded to the District Court with instructions that the proceedings be dismissed for want of jurisdiction.

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[2] This is not to say that the court lacked jurisdiction to issue the writ. The territorial restraints which obtain in habeas do not preclude mandamus jurisdiction. *See Schlanger* v. *Seamans, supra,* at n. 4; 28 U.S.C. §1391(e); Sen. Rep. No. 1992, 87th Cong., 2d Sess., 2 U.S. Code and Adm. News (1962) 2784; 2 Moore's Federal Practice ¶4.29.

APPENDIX A2

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCHIT

No. 26,289

LIEUTENANT JOHN A. STRAIT,

Petitioner-Appellant,

—v.—

MELVIN R. LAIRD, Secretary of Defense; STANLEY R. RESOR, Secretary of the Army; LIEUTENANT GENERAL STANLEY LARSEN, Commanding General, Sixth United States Army; MAJOR GENERAL PHILLIP B. DAVIDSON, JR., Commanding General, Fort Ord, California; COLONEL JOHN J. HOFFMAN, Commanding Officer, United States Army Reserve, Components Personnel Center, Fort Benjamin Harrison, Indiana,

Respondents-Appellees.

[February 17, 1971]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Before:

MERRILL and KOELSCH, *Circuit Judges,* and JAMESON, *District Judge**

* Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

MERRILL, *Circuit Judge*:

By these proceedings in habeas corpus appellant seeks judicial review of an administrative decsion of the Department of the Army denying his request for discharge as a conscientious objector. This appeal is taken from judgment of the District Court for the Northern District of California denying, on the merits, the relief sought. A cross-appeal has been taken by appellees from that portion of the District Court's judgment holding that it had jurisdiction in habeas corpus.

Appellant is an officer in the United States Army Reserve. He received his commission in 1966 on completion of the ROTC course at the University of California at Davis. He was then placed on a delayed reserve status in order to permit him to attend law school at Yale University. Upon graduation from law school, and after being permitted to take the bar examination, he was, in July 1969, ordered to report to Fort Gordon, Georgia, on February 9, 1970 to commence two years active duty as an Army officer. The reporting date was later changed to April 13, 1970.

On January 20, 1970 appellant applied for discharge as a conscientious objector. Pursuant to Army regulations respecting reserve officers the application was submitted to the United States Army Reserve Components Personnel Center at Fort Benjamin Harrison, Indiana. Processing of the application by interviews and hearing was had at Fort Ord, California, and the record was then forwarded to Fort Benjamin Harrison for review by the Conscientious Objector Discharge Review Board. On that Board's recommendation the application for discharge was disapproved by the commander of the Reserve Components Personnel Center. This action followed.

A. JURISDICTION

Threshold questions are presented by the cross-appeal of appellees respecting the habeas corpus jurisdiction of the District Court under 28 U.S.C. §2241.

1. *Was appellant "in custody"?*

It is clear from §2241(c) that the petitioner's being in custody is a jurisdictional requirement. The statute, however, does not define custody. Since the Supreme Court's decisions in *Jones* v. *Cunningham,* 371 U.S. 236 (1963), and *Peyton* v. *Rowe,* 391 U.S. 54 (1968), the concept of custody in habeas corpus has taken on new dimensions, both of space and of time. See generally, Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1071-92 (1970).

The question posed is whether a member of the Army Reserve who has been ordered to report for active duty at a future date is presently under restraint sufficient to amount to custody.

This question was dealt with in *Hammond* v. *Lenfest,* 398 F.2d 705, 710-12 (2d Cir. 1968), where it was held that the restraints were sufficient to constitute custody—"a custody loose at the moment but a custody which may at any time be made as close as the military establishment, by future order or regulation, shall direct." 398 F.2d at 711.

We agree.[1]

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[1] *Johnson* v. *Laird,* —— F.2d —— (9th Cir. Nov. 24, 1970), is not inconsistent. There the Army had refused to process the conscientious objection claim of a member of the National Guard filed after he had received orders to report for active duty. This court, in denying habeas corpus, held that the Army was not required to process the claim prior to the applicant's reporting as ordered. This ruling was not due to any lack of custody prior to reporting (the court recognized that potential restraint could suffice), but

2. *Was appellant held in custody within the territorial jurisdiction of the District Court?*

Section 2241(a) provides that the writ may be granted by District Courts "within their respective jurisdiction."

> "The quoted statutory language limits the power of the District Court to hear and determine a petition for habeas corpus to those instances in which the applicant 'both is physically present in the court's territorial jurisdiction and is detained or held in custody within that jurisdiction.' *United States et ux rel Rudick* v. *Laird,* 412 F.2d 16, 20 (2d Cir. 1969)." *Jarrett* v. *Resor,* 426 F.2d 213, 217 (9th Cir. 1970).

In *Jarrett* this court held that the petitioner was not in custody in the Northern District of California. While his home was in that district, he was in active military service and was stationed at Fort Knox, Kentucky. He was on leave in California awaiting "port call" pursuant to an assignment to duty in Vietnam. His command post remained Fort Knox. We held: "A member of the armed forces who is voluntarily in a place another than an assigned post is not in custody in that place." 426 F.2d at 217.

Respondents rely on that case as support for their contention that appellant was not in custody in California. We find that case distinguishable.

Here appellant's home is in the Northern District of California. As a member of the Army Reserve his activities are directed by the Reserve Officers' Components Personnel Center at Fort Benjamin Harrison, Indiana. He

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was based on the fact that assignment to active duty had been ordered as discipline for the petitioner's absence without leave, with which Army business this court refused to interfere.

was, however, attached to no unit. We have here held that he was under sufficient restraint to constitute custody, and it was at his home in California that these restraints were imposed and their effect felt. Certainly the restraint did not involve performance of duty at Fort Benjamin Harrison. Appellant's home in California was, then, the delayed Reserve equivalent of a duty station.[2] We conclude that he was in custody in the Northern District of California.

3. *Was the presence of appellant's commanding officer within the territorial jurisdiction of the District Court essential to its jurisdiction in habeas corpus?*

Historically, habeas corpus was available only to those persons held in actual physical confinement. Therefore, the respondent-custodian was always to be found in the territorial jurisdiction in which the prisoner-petitioner was held in custody. It is not surprising that no case prior to the expansion of the custody concept in *Jones* v. *Cunningham, supra,* held that one in custody within the territorial jurisdiction of the court could not there obtain habeas relief because of the absence of the proper respondent.[3] The

[2] When the reservist is, with the approval of the Center, pursuing activities in a state other than his home, the pursuit of which provided the basis for his delayed status (as was true here while appellant was attending law school in Connecticut), it would seem that he is in custody in that state since he is in effect assigned to duty there and it is there that restraints are felt. *Donigian* v. *Laird,* 308 F. Supp. 449 (D.Md. 1969); *Nason* v. *Secretary of the Army,* 304 F. Supp. 422 (D.Mass. 1969).

[3] There is language in a few cases to the effect that the presence of the respondent within the territorial jurisdiction is required, but the language was not directed to the problem we are facing. In most of the cases the critical factor in the opinion was the fact that the petitioner was not in custody in the jurisdiction. See *United States ex rel. Keefe,* 222 F.2d 390 (D.C.Cir. 1954), *cert. denied,* 348 U.S. 952 (1955); *Sanders* v. *Bennett,* 148 F.2d 19 (D.C.Cir.

territorial restrictions on habeas jurisdiction which did then develop were intended to avoid problems posed by having to transport a prisoner to a distant forum. See *Carbo* v. *United States,* 364 U.S. 611 (1961); *Ahrens* v. *Clark,* 335 U.S. 188 (1948).

Now that one may be in custody although not subject to actual physical restraints, the courts are confronted with a whole new class of petitioners, many of whom, like appellant, may be in custody in a state other than that in which the respondent is located.

We can see no persuasive reason for making physical presence of the respondent a jurisdictional requirement in such cases.[4] Since respondents seek to make their restraints felt on petitioner in California and thereby to extend the reach of their authority into the territorial jurisdiction of the District Court below, the respondents are in our view sufficiently present to be subject to the jurisdiction of that court.

As stated in *Donigian* v. *Laird,* 308 F. Supp. 449, 453 (D.Md. 1969):

> "For its own convenience and economy, the Army has chosen to centralize its command with respect to Reserve Officers in Donigian's position, rather than having smaller commands throughout the country. The

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1945); *United States ex rel. Harrington* v. *Schotfeldt,* 136 F.2d 935, 940 (7th Cir. 1943), *cert. denied,* 327 U.S. 781 (1946). Elsewhere similar language has been used to suggest that a court does not lose its habeas corpus jurisdiction when a petitioner is removed from the district as long as the respondent remains. *Ex Parte Endo,* 323 U.S. 283, 306 (1944).

[4] Of course, as this court noted in *George* v. *Nelson,* 410 F.2d 1179, 1181 (9th Cir. 1969), change of venue, pursuant to 28 U.S.C. §1404(a), is available in proper cases.

> effect on the plantiff is no different, however, than it would be if his orders were issued to him directly from a local headquarters. The Army seeks to exert control over Donigian in Maryland. It cannot, then, avoid the jurisdiction of this court merely because such control is exercised from a point located outside of this state."

The District Court, then, had jurisdiction to entertain these proceedings. Having jurisdiction, venue is conferred by 28 U.S.C. §1391(e). Upon the cross-appeal of appellees, judgment is affirmed.

B. The Merits

In the processing of appellant's application for discharge at Fort Ord, appellant was first interviewed by an Army psychiatrist who found "no signs of psychiatric disease." He was then interviewed by an Army chaplain who reported: "I believe that he is sincere in indicating that his religious beliefs preclude participation in war in any form. I believe that his convictions are primarily religious in basis and origin."

Appellant was then given a hearing by an Army captain as hearing officer. The hearing was thorough, consuming approximately three hours. The report of this officer discussed appellant's concept of a Supreme Being and of the nature of religion and his views respecting violence and war. The report concluded: "Based upon Lieutenant Strait's stated beliefs and the sincerity with which he appeared to hold these beliefs, it is my determination that Lieutenant Strait's beliefs fall within a *very liberal* interpretation of the case of *United States* v. *Seeger*, 85 S.Ct. 850 (1965)." Further, "it is my opinion that Lieutenant Strait's beliefs are sincerely held."

At Fort Benjamin Harrison appellant's record was first reviewed by a lieutenant colonel, chief of the Delayed Officer Management Division, acting in the capacity of appellant's immediate commander. His report recommended disapproval, citing appellant's political activities and concluding that the chaplain and the hearing officer "erred or were misled in their determination that [his] beliefs were religious in origin."

The Review Board then acted and, with three members out of fifteen participating, recommended disapproval for these reasons:

1. That appellant's beliefs were not truly held.

2. That they were not religiously founded but reflected political, sociological and philosophical views and a personal moral code.

3. That appellant's objections to war were confined to this particular war.

We have carefully reviewed the record and conclude that the findings of the Review Board are wholly without basis in fact.

The greater part of the Board's memorandum is devoted to the proposition that appellant's views were not religiously founded. This, appellees concede, was error, since appellant's views meet the standards announced in *Welsh* v. *United States,* 398 U.S. 333 (1970), handed down after the Board had taken its action.

There is no support for the Board's finding that appellant's objections to war were limited to Vietnam. The application makes clear the scope of his objections to violence and to war in general. The fact that his political action and expressions of protest were directed against the

one war in which this country was engaged is not inconsistent with his avowed beliefs. It indicates no more than that there was a limited area in which action in support of his beliefs was called for.

The sole remaining basis for rejection of the application was the Board's finding that appellant's views were not truly held. In this, acting upon the cold record and without benefit of interview or opportunity for rebuttal of its findings by appellant (which opportunity Army regulations appear to regard as due), it rejected the findings of those who had interviewed appellant to the effect that his views were sincerely entertained.

Two reasons were given by the Board. It stated that this was the first case of conscientious objection that the hearing officer had reviewed. This was simple error. The officer had had substantial past experience in this respect.

The sole remaining reason for finding lack of sincerity (and the reason on which appellees now rely as establishing basis in fact) was appellant's delay in applying for discharge after crystallization of his beliefs, which the hearing officer had found to have occurred in his second year of law school. The Board emphasized that there were earlier opportunities—occasions on which, if objections did exist, one would have expected them to be expressed: (1) Appellant in 1968 requested an extension of delay status to permit him to take a bar examination and qualify for judge advocate general commission (which commission he later refused); (2) in 1969 a certificate of medical fitness was provided by him; (3) in 1969 he was promoted to the rank of first lieutenant.

The Board apparently felt that appellant had not adequately explained his delay in expressing his views. It

concluded that he was nothing more than "an educated, skillful opportunist who had used his military status for every shred of protection it could offer and then, when called to active duty, attempted to gain relief from his obligation under the guise of a conscientious objector claim."

But the reasons for appellant's delay were explicitly set forth in his application and in a manner wholly consistent with the existence of conscientious objection.[5] He states that he recognized that he had placed himself "in an untenable position in relation to the Army * * *. The last year of my life has been a stormy period of soul searching and agonizing, trying to reconcile my beliefs and conscience with my contract with the Army." It was the suicide of his cousin (also a conscientious objector) in November of 1969 that ultimately "broke the emotional bind I was in and freed me to assert my beliefs."

We do not find it implausible that one with conscientious scruples[6] should find it difficult casually to dismiss his obligations to the Army. Rather we regard it as wholly consistent with conscientious objection that the enlisted soldier should strive to find some means of reconciling a conflict between conscience and duty in such a fashion that

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[5] The "opportunist" aspect disappears when it is recognized (as counsel for appellees concedes) that the "protection" enjoyed by appellant was no greater than the Selective Service regulations then applicable would have afforded through student deferments.

[6] That appellant's conscience manifested itself in areas other than objection to war is abundantly established. Among other activities he worked for the United States Commission on Civil Rights in Alabama and in the southwest; he participated in a project engaged in reviewing arrest records and interviewing blacks who had been arrested; he served as an observer of the first attempts of the blacks in Mississippi to organize politically.

both might be respected and to postpone repudiation of the claims of duty until it becomes clear that their demands make reconciliation impossible.

Accordingly we find the explanation given by appellant for delay in asserting his claim to be reasonable and credible unless some basis for rejecting it otherwise appears from the record. We have searched in vain for such basis.

We conclude, then, that no basis in fact exists for rejection of appellant's claim and that he is entitled to his discharge.

Appellant in his application for discharge expressed his consent to perform postmilitary work of the nature encompassed by the civilian work program administered by the Selective Service System. His hearing officer, in recommending discharge, recommended that he be required to perform such work. In our view such a condition of discharge would be proper under the circumstances.

Accordingly the matter is remanded with instructions that the Army be allowed a reasonable time within which to grant discharge to appellant pursuant to Army regulations applicable to conscientious objectors; failing which, discharge (subject to an order to perform appropriate civilian work) shall be granted by the District Court.

JAMESON, *District Judge* (Concurring):

I agree with Judge Merrill that there is no basis in fact for rejecting appellant's claim as a conscientious objector on the ground of insincerity. I think it is clear from the record before this court that appellant was a sincere conscientious objector when he applied for discharge on January 20, 1970 and for at least two years prior thereto. This conclusion, however, should not be construed as jus-

tifying or condoning appellant's conduct in accepting the benefits of his reserve commission without disclosing his conscientious objector beliefs until he was called for active duty.

Appellant attended Yale Law School from September, 1966 to June, 1969. The Hearing Officer found that appellant's beliefs were religious in nature, sincerely held, and became "fixed during [his] second year of law school," i.e., between September, 1967 and June, 1968. The finding of the Conscientious Objector Review Board (in a decision prior to Welsh v. United States, 398 U.S. 333 (1970)) that appellant's "alleged conscientious objector beliefs are not truly held" was interwoven with its finding that the beliefs "are poorly grounded in religious training and belief; and any objection to war in any form he might truly hold is based solely on political reasons, sociological experiences, philosophical views, a personal moral code, and objection to a particular war." Appellees concede that appellant's beliefs, "if truly held, would qualify under Welsh v. United States * * *."

Appellant's detailed application recounts substantial anti-war and antidraft activities beginning in the fall of 1967 and, as he stated, much of his work "concerned conscientious objection." All of the other evidence presented in support of the application indicates that appellant's conscientious objector beliefs were truly held under the test of religious belief recognized in Welsh.

On the other hand, I think the Board could properly find that the imminence of active duty was the cause of appellant's application for discharge. On August 20, 1968, appellant requested that his delayed status be continued until January 1, 1970 to permit him to take the California

bar examination and qualify for a Judge Advocate General commission. On February 15, 1969 he returned a Certification of Medical Fitness indicating that he was physically qualified for military service. On June 7, 1969 he was promoted to first lieutenant, and apparently accepted without comment. On July 9, 1969, after declining an appointment in the Judge Advocate General Corps, appellant was notified that he was scheduled to report for active duty on February 9, 1970 (later amended to April 13, 1970). On October 1, 1969 he again requested rescheduling of his active duty commencement date. On January 20, 1970 applicant submitted his application for discharge as a conscientious objector. At no time prior thereto had he asserted his conscientious objector beliefs.

It is true, as appellees argue, that this court has held in a number of cases that the Board may consider "suddenness of conversion," particularly after receipt of an order to report for active duty, in determining whether conscientious objector beliefs are sincerely held.[1] These cases were decided prior to Welsh v. United States and are distinguishable with respect to the religious test to be applied. In most of them there was additional evidence to support a finding of insincerity. By reason of appellant's failure to assert his conscientious objector beliefs until called for active duty, a close question is presented.[2] From a review of all

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[1] See e.g., Maynard v. United States, 409 F.2d 505 (1969); Bishop v. United States, 412 F.2d 1064 (1969); Negre v. Larsen, 418 F.2d 908 (1969); and Speer v. Hedrick, 419 F.2d 804 (1969).

[2] The obvious feeling of the Board that appellant should have submitted an application for discharge at an earlier date is understandable. It is true, as the Board's decision indicates, that appellant was willing to accept any benefits of his status as a reserve officer until he was required to report for active duty. On the other hand, there was no legal obligation to submit an earlier application,

the evidence, however, I conclude that this fact alone is not sufficient to support a finding that applicant's conscientious objector beliefs were not truly and sincerely held.[3]

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and his own explanation, as set forth in Judge Merrill's opinion, is credible, even though different inferences may also properly be drawn.

[3] In fact, it is difficult to see how appellant could have entered active duty without making an application for discharge in the light of his beliefs and activities as set forth in detail in the record.

APPENDIX B

CONSTITUTION OF THE UNITED STATES

Article I, Section 9

The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES

5 United States Code §701 (Supp. V, 1965-70)

Application; definitions.

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

5 United States Code §702 (Supp. V, 1965-70)

Right of Review.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within

the meaning of a relevant statute, is entitled to judicial review thereof.

5 United States Code §703 (Supp. V, 1965-70)

Form and venue of proceeding.

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

28 United States Code §1331(a) (1964)

Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 United States Code §1361 (1964)

Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 United States Code §1391(e) (1964)

A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

28 United States Code §2241(a) and (b) (1964)

Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

*AR 135-25

Headquarters
DEPARTMENT OF THE ARMY
Washington, D.C. *2 September 1970*

Army National Guard and Army Reserve

DISPOSITION OF CONSCIENTIOUS OBJECTORS

Effective 1 August 1970 in accordance with DA message RCPL 031400Z Aug 70

This change was necessitated by the recent Supreme Court decision, Welsh v. *United States which exempted from military service "all those whose conscience spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war." Local supplementation of this regulation is prohibited except upon approval of Chief of Personnel Operations.*

1. Purpose. This regulation prescribes policies, criteria, and procedures governing the disposition of Reserve members of the Army who claim to be conscientious objectors.

2. Applicability. a. This regulation applies to all Reserve members of the Army, except those specified in *b* below.

b. The provisions of AR 600-200, AR 614-106, and AR 635-20 govern the disposition of Reserve members of the Army who claim to be conscientious objectors and who are either—

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* This regulation supersedes AR 135-25, 17 June 1970, and DA message RCPL 031400Z Aug 70(U), subject: Interim Change to AR 135-25, 17 June 1970.

(1) Serving in the active military service in their Reserve status; or

(2) Serving on initial active duty for training in their status as Reserves of the Army.

3. Explanation of terms. For the purpose of this regulation, the following terms will apply:

a. Reserve members of the Army. Commissioned officers, warrant officers, and enlisted members of the Army National Guard of the United States and of the Army Reserve.

b. Conscientious objector. An individual who, by reason of deeply held moral, ethical, or religious beliefs, has been found to be—

(1) Conscientiously opposed to participation in war in any form and conscientiously opposed to participation in both combatant and noncombatant training and service in the Armed Forces (I-O classification); or

(2) Conscientiously opposed to combatant training and service in the Armed Forces (I-A-O classification).

c. Noncombatant service and training.

(1) Noncombatant service and training means—

(*a*) Service in any unit which is unarmed at all times;

(*b*) Subject to individual's acceptance, any service, the primary function of which does not require the use of arms in combat, provided such assignment does not require him to bear arms or to be trained in their use.

(*c*) Service in the Army Medical Department, wherever performed.

(2) Noncombatant training consists of any training which does not have to do with the study, use, or handling of arms or weapons.

4. Policy. a. No vested right exists for an individual to be discharged at his own request by reason of conscientious objection prior to the expiration of his contractual or statutory obligation.

b. All requests for discharge based upon conscientious objections will be handled on an individual basis with final determination made at Headquarters, Department of the Army, in accordance with the criteria and procedures outlined in this regulation. The type of discharge, if separation is warranted, will be determined by the member's military record and the standards and procedures outlined in this regulation. For the purpose of this regulation, active duty for training (ADT), other than initial ADT, or annual training (AT) will not be considered as active duty.

5. Eligibility for consideration. a. Consideration will be given to requests for discharge by reason of conscientious objection to participation in war, in any form, when such objection develops subsequent to the member's entry into military service, whether such entry was by induction, enlistment, or appointment in any component of the Army.

b. Federal courts have held that a claim to exemption from military service under Selective Service laws must be interposed prior to notice of induction, and failure to make timely claim for exemption constitutes waiver of the right to claim. However, claims based on conscientious

objection growing out of experiences prior to entering military service, but which did not become fixed until entry into the service, will be considered.

c. Consideration will not be given to requests for discharge based solely on conscientious objection which—

(1) Existed but was not claimed prior to member's initial entry into military service either by induction or enlistment or appointment in any component of the Army; or

(2) Existed but was claimed and denied by Selective Service prior to member's induction into the active military service; or

(3) Based solely upon consideration of policy, pragmatism, or expediency; or

(4) Claims objection to a particular war.

6. Applications for discharge. Reserve personnel requesting discharge by reason of conscientious objection will submit such request in accordance with the following instructions:

a. Applications for discharge by reason of conscientious objection may be submitted on DA Form 2496 (Disposition Form) or by letter. The individual requesting discharge will include in the application, or as an inclosure thereto, the information indicated below as the minimum required for consideration of his request. The individual may submit such other information as desired. All information will be specific in nature; where applicable, dates and/or length of time will be given or estimated. Generalities such as "several years" or "many months" will be avoided.

(1) *General information.*

(*a*) Full name.

(*b*) Social security account number.

(*c*) Selective Service number.

(*d*) Service address.

(*e*) Permanent home address.

(*f*) Name and address of each school and college attended, together with the dates of attendance, and the type of school (public, church, military, commercial).

(*g*) A chronological list of all occupations, positions, jobs, or types of work, other than as a student in school or college, whether for monetary compensation or not. Include the type of work, name of employer, address of employer, and the from/to date for each position or job held.

(*h*) All former addresses and dates of residence at these addresses.

(*i*) Parent's name and addresses. Indicate whether they are living or deceased.

(*j*) The religious denomination or sect of both parents.

(*k*) Was application made to the Selective Service System (Local Board) for classification as a conscientious objector prior to entry into the Armed Forces? To which local board? What decision was made by the Board if known?

(*l*) When the applicant has served less than 180 days active duty (excluding ADT and AT), a statement as to willingness to perform work under the Selective Service civilian work program for conscientious objectors, if dis-

charged as a conscientious objector. Also a statement of the applicant as to whether he consents to the issuance of an order for such work by the local Selective Service Board.

(2) *Religious training or beliefs held.*

(*a*) A description of the nature of belief which is the basis of claim.

(*b*) Explain how, when, and from whom or from what source the applicant received the training and acquired the belief which is the basis of claim.

(*c*) The name and present address of the individual upon whom the applicant relies most for guidance in matters of convictions relating to claim.

(*d*) A statement as to circumstances, if any, under which the applicant believes in the use of force.

(*e*) A description of the actions and behavior in the applicant's life which in his opinion most conspicuously demonstrates the consistency and sincerity of convictions which gave rise to claim.

(*f*) A statement as to whether applicant has ever given public expression, written or oral, to the views expressed in his application as the basis for claim. If so, specify when and where.

(3) *Participation in organizations.*

(*a*) Information as to whether applicant has ever been a member of any military organization or establishment before entering upon his present terms of service. If so, the name and address of such organization will be given together with reasons why he became a member.

(*b*) A statement as to whether applicant is a member of a religious sect or organization. If so, the statement will show the following:

1. The name of the sect, and the name and location of its governing body or head, if known.

2. When, where, and how the applicant became a member of said sect or organization.

3. The name and location of any church, congregation, or meeting which the applicant customarily attends.

4. The name, title, and present address of the pastor or leader of such church, congregation, or meeting.

5. A description of the creed or official statements, if any, and if they are known to him, of said religious sect or organization in relation to participation in war.

(*c*) A description of applicant's relationships with and activities in all organizations with which he is or has been affiliated, other than military, political, or labor organizations.

(4) *References.* Submit statements of individuals who can attest to the sincerity of applicant's professed convictions regarding participation in war. These statements will reflect the individual's full name, address, occupation or position, relationship to applicant, the length of time the individual has known the applicant, and the frequency of contact during the period.

b. The application for discharge will be submitted to the commander having custody of the member's records as outlined below.

(1) *Unit members.* ARGUS and USAR members assigned to units will submit their applications to the commanding officer of the unit to which assigned. Members of the inactive National Guard will submit their applications to commanding officer of the unit to which attached.

(2) *Nonunit members.* Ready Reserve nonunit members and Standby Reserve members will submit their applications to the oversea area commander; Commanding Officer, U.S. Army Reserve Components Personnel Center, Fort Benjamin Harrison, IN 46249; or the Commanding Officer, U.S. Army Administration Center, 9700 Page Boulevard, St. Louis, MO 63132, as appropriate.

7. *Procedures. a.* Commanders having custody of the member's records will take the actions prescribed below.

(1) Immediately upon receipt of a request for discharge on the grounds of conscientious objection, the member will be fully advised and counseled concerning the provisions of section 3103 of title 38, United States Code, which provides in pertinent part that the discharge of any person on the ground that he was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority, shall bar all rights (except Government insurance) of such persons under laws administered by the Veterans Administration, based upon the period of service from which discharged or dismissed. The only exception is in the cases in which it is established, to the satisfaction of the administrator, that the member was insane.

(2) After counseling, the member will be required to sign and date the following statement:

I have been counseled concerning nonentitlement to benefits administered by the Veterans' Administration due to discharge from the military service as a conscientious objector. I understand that a discharge as a conscientious objector who refuses to perform satisfactorily military duty or otherwise to comply with lawful orders of competent military authority will bar all rights based upon the period of service from which discharged under any law administered by the Veterans' Administration except my legal entitlement (if any) to any war risk, Government (converted) or National Service Life Insurance.

b. The commander will arrange for the applicant to be interviewed. Expenditure of funds or the use of Government transportation for applicants in connection with these actions is not authorized.

(1) Applicant will be interviewed by a military chaplain, preferably of the applicant's faith, who may be from any component of the Armed Forces. The chaplain will submit a report of interview to the commander to include comments on the sincerity of the applicant in his belief and an opinion as to the source of the applicant's belief. *A recommendation for approval or disapproval will not be included.*

(2) Applicant will be interviewed by a military medical officer, preferably one trained in and practicing psychiatry, who may be from any component of the

Armed Forces. The medical officer will submit a report of psychiatric evaluation to the commander indicating the presence or absence of any psychiatric disorder which would warrant treatment of the applicant or disposition of records through medical channels. *A recommendation for approval or disapproval will not be included.*

(3) The applicant will be afforded an opportunity to appear in person (with counsel retained by him if he desires) before an officer, other than required in (1) and (2) above, in the grade of O-3 or higher, who is knowledgeable in policies and procedures relating to conscientious objector matters. The officer conducting the interview will permit the applicant to be heard in support of his application and he will make such other inquiries into the merits of the application as he considers appropriate. The officer conducting the interview will submit in writing his recommendations, and reasons therefor, to the commander. If the applicant waives the opportunity to be heard, his waiver will be obtained in writing and made an inclosure to the application for discharge.

(4) The commander will advise the interviewing officers of the requirements of (1), (2), and (3) above. In addition, officers conducting interviews as provided in (1) and (3) above will be furnished a copy of this regulation, application, and supporting papers.

c. Area commanders will provide assistance upon request from the Commanding Officer, U.S. Army Reserve Components Personnel Center, or Commanding Officer, U.S. Army Administration Center, as appropriate, to arrange

for necessary interviews of nonunit reservists residing in their geographical area of jurisdiction. Two copies of this regulation, application, and supporting papers will be furnished to the area commander for compliance with *b*(4) above. The Commanding Officer, U.S. Army Reserve Components Personnel Center, and Commanding Officer, U.S. Army Administration Center will be advised of the date, time, and facility where applicant should report for interview and are responsible for informing the applicant when and where to report for this purpose. Reports of interview for nonunit reservists will be mailed direct to the Commanding Officer, U.S. Army Reserve Components Personnel Center, or Commanding Officer, U.S. Army Administration Center, as appropriate.

d. DD Form 1589 (Department of Defense Summary Sheet for Review of Conscientious Objector Application) will be completed and forwarded as inclosure to application for discharge in accordance with *f* or *g* below.

e. The application for discharge, together with the inclosure(s), DD Form 1589, reports of interviews, and the officer's recommendation or waiver required by *b*(3) above will be forwarded in quadruplicate (original and three copies) in accordance with *f* or *g* below, whichever is appropriate. The members Military Personnel Records Jacket, U.S. Army (DA Form 201) will also be included.

(1) The immediate commander's comment will include the following information:

(*a*) Whether approval or disapproval is recommended and the reasons therefor.

(*b*) Date of appointment or current enlistment.

(*c*) Duty and primary MOS (enlisted personnel only).

(*d*) Whether medical board or physical evaluation board proceedings are pending or appropriate.

(*e*) Whether the member is under any type of investigation, absent without leave, or whether any flagging action has been taken in accordance with AR 600-31.

(2) Other forwarding indorsements will include recommendation for approval or disapproval and any other remarks as may be pertinent.

f. Applications submitted by ARNGUS personnel will be forwarded to the appropriate State adjutant general who will forward the case to the Chief, National Guard Bureau, Department of the Army, Washington, DC 20310.

g. Applications submitted by USAR personnel will be forwarded through military channels to the Commanding Officer, U.S. Army Reserve Components Personnel Center, ATTN: RCPA, Fort Benjamin Harrison, IN 46249.

h. The Commanding Officer, U.S. Army Reserve Components Personnel Center, will convene a board of officers to determine findings and submit recommendations on all applications for discharge submitted under this regulation. The board will follow the general procedures set forth in AR 15-6. The format of the board proceedings will be prescribed by the Commanding Office, U.S. Army Reserve Components Personnel Center.

8. Assignment. An individual who applies for discharge based on conscientious objection will be assigned duties pro-

viding the minimum conflict with his professed beliefs and will be required to maintain the same standards of performance and behavior as other personnel assigned to his unit pending a final decision on his application. This paragraph will not be applicable when subsequent applications are filed by an individual based upon substantially the same supporting information as previously submitted and disapproved by Headquarters, Department of the Army (para. 12).

a. Normally a minimum period of 90 days is required to finalize the processing of an application submitted in accordance with this regulation. The submission of an application for discharge by reason of conscientious objection subsequent to the date the individual's orders are published announcing reporting date for active duty or active duty for training is *not* a basis for delay in reporting for designated duty. In the event an individual is ordered to report to active duty or active duty for training while a request for discharge under this regulation is being processed, and the individual is advised that final action cannot be made prior to his reporting date for duty, the individual will be required to comply with his orders. In such instance, his application will be forwarded to the appropriate Active Army commander for processing.

b. An individual who is reported by his unit commander for involuntary active duty under provisions of AR 135-91 cannot subsequently tender a request for conscientious objector classification under the provisions of this regulation. Such requests will be returned by the unit commander advising the individual to submit his application at his first duty station under the provisions of AR 635-20, AR 600-200, or AR 614-106.

9. Disposition of individuals determined to be bona fide conscientious objectors. a. Discharge of personnel classified I-O. When authorized by Headquarters, Department of the Army, individuals who have been determined to be bona fide conscientious objectors with classification I-O will be discharged for the convenience of the Government in accordance with AR 135-175 or AR 135-178, whichever is appropriate. The discharge authority will insure that conscientious objection will be specifically cited in the discharge order as the supporting reason when that is the sole reason for discharge.

b. Disposition and utilization of personnel classified I-A-O. Individuals who are bona fide conscientious objectors with classification I-A-O are not eligible for discharge under this regulation. Individuals classified I-A-O will be identified by an entry on the individual's DA Form 20 (Enlisted Qualification Record) or DA Form 66 (Officer Qualification Record) as provided by AR 600-200 and AR 611-103. Such individuals will be required to complete their Ready Reserve and statutory obligation or term of enlistment subject to the assignment instructions outlined below. Individuals assigned in accordance with the provisions of (1) below will be required to sign and date in duplicate the statements as indicated below. The original will be filed in individual's Military Personnel Records Jacket, U.S. Army (DA Form 201). A signed duplicate will be forwarded to the CO, USAAC.

> I have been counseled concerning designation as a conscientious objector. Based on my deeply held moral, ethical, or religious beliefs, I consider myself to be a conscientious objector within the meaning of the statute and regulations governing conscientious objectors

and am conscientiously opposed to participation in combat training and service. I request assignment to noncombatant duties for the remainder of my term of service. I fully understand that on expiration of my current term of service, I am not eligible for voluntary enlistment, reenlistment, extension, or amendment of current enlistment, or active service in the Armed Forces.

(1) Ready Reserve members will be—

(*a*) Continued in current Reserve assignment if such assignment qualifies as noncombatant service and training;

(*b*) Assigned to an appropriate vacancy in a Reserve medical unit, if available; or

(*c*) Assigned to an annual training or reinforcement control group, whichever is appropriate, under criteria prescribed in AR 140-10.

(2) Standby Reserve members will be continued in current assignment.

(3) ARNGUS members who, upon separation from their State status as Army National Guard and/or upon withdrawal of Federal recognition, revert to USAR status will be assigned in accordance with (1) (*b*) or (*c*) above.

10. Disapproved requests. Upon determination that neither I-O or I-A-O classification is appropriate, the individual requesting discharge will be advised by his commanding officer that his request has been denied, giving reasons for such denial.

11. Unsatisfactory participation. Any member reassigned to noncombatant duties or retained in his normal duty as-

signment, who demonstrates or has previously demonstrated his inability or unwillingness to cooperate in a manner which constitutes the basis for disciplinary action, will be subject to appropriate disciplinary action the same as any other Reserve member of the Army.

12. When second and subsequent applications are submitted. Area commanders; Commanding Officer, U.S. Army Reserve Components Personnel Center; Commanding Officer, U.S. Army Administration Center; or the State adjutant general, as appropriate, are authorized to return to an applicant, without action, any second and subsequent application for discharge under this regulation when review reveals that it is substantially the same as a previous application disapproved by Headquarters, Department of of the Army.

13. Removal of identification as conscientious objector. When an individual who, under paragraph 9*b* has been determined to be a bona fide conscientious objector, desires to have identification as a conscientious objector removed, the following procedures will apply:

a. He will submit his request to his commanding officer, using DA Form 2496 (Disposition Form) or letter, prepared in four copies and all copies will be signed. If applicable, the request will contain the individual's Selective Service Number, local board number, and address.

b. The custodian of his records will then delete the conscientious objector entry on the individual's DA Form 66 or DA Form 20, whichever is appropriate. Action will also be taken to delete this identification from any data processing records on which the classification may be coded. The

custodian will indicate by comment on all copies of the DA Form 2496 when the entry on the DA Form 66 or DA Form 20 has been deleted and distribute the copies as follows:

(1) Original to be filed as a permanent document in the individual's Military Personnel Records Jacket, U.S. Army.

(2) Copy to be forwarded through channels to the appropriate State adjutant general or Commanding Officer, U.S. Army Administration Center.

(3) Copy to be forwarded to the appropriate State Director, Selective Service System. See AR 601-49 for Selective Service System addresses.

(4) Copy to be returned to the individual concerned.

c. The custodian of the Military Personnel Records Jacket or Official Military Personnel File, as appropriate, will remove and destroy the statement required by paragraph 9*b*.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

~~No. 83~~ 71-83

LIEUTENANT JOHN A. STRAIT,

Petitioner,

—v.—

HONORABLE MELVIN R. LAIRD, Secretary of Defense; HONORABLE STANLEY R. RESOR, Secretary of the Army; LIEUTENANT GENERAL STANLEY LARSON, Commanding General, Sixth United States Army; MAJOR GENERAL PHILIP B. DAVIDSON, JR., Commanding General, Fort Ord, California; COLONEL JOHN H. HOFFMAN, Commanding Officer, United States Army Reserve Components Personnel Center, Fort Benjamin Harrison, Indiana,

Respondents.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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In the

Supreme Court of the United States

October Term, 1971

No. 83

Lieutenant John A. Strait,

Petitioner,

—v.—

Honorable Melvin R. Laird, Secretary of Defense; Honorable Stanley R. Resor, Secretary of the Army; Lieutenant General Stanley Larson, Commanding General, Sixth United States Army; Major General Philip B. Davidson, Jr., Commanding General, Ford Ord, California; Colonel John H. Hoffman, Commanding Officer, United States Army Reserve Components Personnel Center, Fort Benjamin Harrison, Indiana,

Respondents.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of *Amicus**

The American Civil Liberties Union is a nationwide, non-partisan organization of over 160,000 members, engaged solely in the defense of those liberties guaranteed by the Bill of Rights. In its fifty-year existence it has been

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* Letters of consent from the petitioner and the respondent to the filing of this brief pursuant to Rule 42(1) have been filed with the Clerk of the Court.

particularly concerned that procedural remedies, especially ones such as the Great Writ, be fully available to rectify the denial of civil liberties.

In recent years, the American Civil Liberties Union has provided legal representation to hundreds of servicemen who have sought release from military custody because their rights of free expression, religious liberty, or due process of law have been infringed. While habeas corpus has been the primary vehicle for safeguarding those substantive rights, federal courts have utilized other remedies, such as mandamus, to afford relief to the serviceman's underlying claim on the merits.

In addition, the American Civil Liberties Union participated as *amicus curiae* in *Schlanger* v. *Seamans*, 28 L. Ed.2d 251 (1971), where we urged a flexible reading of the habeas corpus statutes to allow district court jurisdiction in such cases. It has been our experience that the *Schlanger* decision, as interpreted by certain federal courts like the one below, has caused substantial hardship for the class of litigants represented by Lieutenant Strait. Indeed, one of the undersigned counsel is the attorney for the petitioner in *Arlen* v. *Laird*, —— F. Supp. —— (S.D.N.Y. 1971), *app. pending*, No. 71-1446, a case almost identical to the instant one, where the District Court held that it had no jurisdiction to consider the merits of the petition.

Your *amicus* submits that certiorari should be granted so that petitioners like Lieutenant Strait will be afforded a forum to litigate their constitutional claims.

Reasons for Granting the Petition for Certiorari

1. Lower court decisions interpreting *Schlanger* v. *Seamans, supra,* have caused great difficulties and uncertainties for the class of litigants represented by this petitioner.

In *Schlanger,* this Court dealt with the situation of an active-duty serviceman with a regular duty station in Georgia. He brought his habeas corpus petition in the District of Arizona where he was on temporary assignment. The Court held that since there was no proper respondent within that District, the court was without jurisdiction over the petition.

Sergeant Schlanger's situation was an exceptional one. The vast majority of active duty servicemen are assigned to the same post as their commanding officer; the unique jurisdictional problems which were presented in *Schlanger* rarely arise. In addition, there may have been some uncertainty about that petitioner's ultimate right to relief on the merits. The Court may have felt that these two factors minimized the need for the expansive reading of the relevant statutes which the petitioner and the *amicus curiae* urged upon the Court.

Here, however, Lieutenant Strait is *typical* of a large class of servicemen confronted with the identical jurisdictional problems. Like thousands of others, he is a reserve officer with a delayed active duty obligation. As such, he is attached to no reserve unit, and, of course, to no regular post. His activities are controlled by the United States Reserve Components Personnel Center at Fort Benjamin Harrison, Indiana, although he has never been there. All of his relevant contacts with the Army have occurred in

the Northern District of California, where he resides and where he brought this action. Virtually the identical factual pattern is represented in *Arlen* v. *Laird, supra; Eisel* v. *Resor*, —— F. Supp. ——, Misc. Civ. 71-28-J (D. Mass. 1971) (distinguishing *Schlanger* and granting injunctive relief), and a number of other cases of which counsel for *amicus curiae* are aware. Yet, decisions like the one below are likely to leave these petitioners—many of whom, like Lieutenant Strait, assert clearly valid claims—without an effective forum to seek a judicial resolution of those claims. In addition, uncertainty as to the proper forum can be highly prejudicial as, for example, when the adverse administrative decision is rendered short days before the applicant is scheduled to report for active duty.

In sum, the uncertainties generated by this Court's decision in *Schlanger* have had a substantially adverse effect on the class of litigants represented by the petitioner here. A writ of certiorari should be granted so that the Court can determine whether the *Schlanger* decision can properly control these reservist cases.

2. The question presented here was specifically left undecided in *Schlanger*.

On the facts presented in *Schlanger*, this Court held that there was no proper respondent within the reach of the process of the District Court, even though the commanding officer's "arm was long and petitioner was effectively subject to his orders and directions." 28 L. Ed. at 253. The Court went on to note that,

> There are cases which suggest that such control to establish custody may be adequate for habeas corpus jurisdiction even though the control is exercised from

> a point located outside the State, as long as the petitioner is in the district or the State. Donigian v. Laird, 308 F. Supp. 449. For reasons to be stated, we do not reach that question here. 28 L. Ed.2d at 253-4.

The instant case, of course, presents this precise question, specifically reserved in *Schlanger*.

There are persuasive reasons why cases like the instant one are indeed different from *Schlanger*. For example, the petitioners will usually be long-term residents of the district where they file suit and will rarely have been in the district where the record-keeping center is located; most of the contacts relevant to the administrative proceeding will have been there. See, Hanson, *The Jurisdictional Bases of Federal Court Review of Denials of Administrative Discharges from the Military*, 3 SSLR 4001, 4007 (1971). Finally, to hold, with the Court below, that thousands of inactive reservists scattered throughout the country must come to Indiana to litigate their claims is to exalt "the mysteries of Army bookkeeping" over the judicial vindication of substantial federal claims. *Feliciano v. Laird*, 426 F.2d 424, 427, n. 4 (2d Cir. 1970).

3. There are jurisdictional bases, apart from habeas corpus, to sustain the District Court's power to act.

The petition for certiorari suggests that in addition to its authority under the habeas corpus statutes, the District Court was empowered to hear this case pursuant to other jurisdictional provisions, most importantly, the mandamus jurisdiction conferred by 28 U.S.C. Section 1361, taken together with the venue provisions of 28 U.S.C. Section 1391. At this point little can be added to the petitioner's

analysis of the increasing use of mandamus to remedy arbitrary action by federal officials. We would, however, point out that if both habeas corpus relief, as well as the other forms of relief suggested by the petitioner, are held to be unavailable, then the petitioner and countless others who have a right to be discharged from the Army, will be denied an effective remedy. Such a result is not consonant with our concepts of due process. See *Ex Parte Young*, 209 U.S. 123 (1908).

CONCLUSION

For the reasons set forth above, *amicus curiae* respectfully urges the Court to grant the writ of certiorari.

Respectfully submitted,

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August 1971.

In the Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-83

LT. JOHN A. STRAIT, PETITIONER

v.

HON. MELVIN R. LAIRD, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court below on rehearing (Pet. App. A1) and the court's initial opinion (Pet. App. A2) are not yet reported.

JURISDICTION

The judgment of the court of appeals on rehearing was entered on June 4, 1971. The petition for a writ of certiorari was filed on July 15, 1971. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly ruled that the district court lacked habeas corpus jurisdiction

446-902—71

under this Court's ruling in *Schlanger* v. *Seamans*, 401 U.S. 487.

2. Whether the district court had jurisdiction under the mandamus provisions of 28 U.S.C. 1361 or under other statutes.

STATEMENT

Petitioner was commissioned a Second Lieutenant in the Military Police Corps of the United States Army Reserve in June 1966 after successfully completing the Army Reserve Officer Training Course at the University of California. Thereafter, he was permitted to defer his active duty obligation in order to enroll in and complete a course of studies at Yale University Law School in New Haven, Connecticut (R. 186–187). Upon graduation from law school in June 1969, he returned to California to take the bar examination.

As a reserve officer with a deferred active duty obligation, petitioner was not required to attend monthly drills or summer encampments. He was assigned at all times during the delay in active service to the United States Army Reserve Components Personnel Center, Fort Benjamin Harrison, Indianapolis, Indiana.

On June 7, 1969, petitioner accepted a promotion to First Lieutenant. On July 18, 1969, petitioner took a medical examination and was found physically fit to enter active duty.

Petitioner was notified on July 9, 1969, to report to Fort Gordon, Georgia, on February 9, 1970, to fulfill

his two year active duty obligation. On January 20, 1970, about three weeks before his scheduled arrival at Ft. Gordon, he applied for a discharge as a conscientious objector. Pursuant to Army regulations, the application was submitted to the United States Army Reserve Component Personnel Center (RCPC) at Fort Benjamin Harrison, Indiana. Interviews and hearings in processing the application were conducted at Fort Ord, California, and the record was forwarded to the Conscientious Objector Discharge Review Board at Fort Benjamin Harrison. The Board recommended that the application for discharge be disapproved because of petitioner's lack of sincerity, and on April 7, 1970, the RCPC Commander, Colonel John H. Hoffman, disapproved the application (R. 187).

Petitioner's orders to report to Ft. Gordon on February 9, 1970, were changed in October 1969; pursuant to his request for additional time to take the bar examination. On March 5, 1970, he was again ordered to report to Fort Gordon on April 13, 1970. Petitioner initiated this habeas corpus action on April 9, 1970, four days before the date he was required to report, in the United States District Court for the Northern District of California (R. 250–251).

On April 10, 1970, the district court issued a show cause order and directed that petitioner remain within its jurisdiction and not be assigned duties inconsistent with the provisions of AR 135–25 (R. 106). The government responded by asserting that the district court lacked jurisdiction (R. 186) since petitioner was assigned to the United States Army Reserve

Component Center at Fort Benjamin Harrison, Indiana, and, therefore, was not in custody in, nor was his custodian in, the court's judicial district in California. The court held that it had jurisdiction of petitioner's claim, but denied petitioner's application for writ of habeas corpus on the merits (R. 233–A), and, after further argument, declined to reconsider its decision (R. 251).

The court of appeals originally held that the district court had jurisdiction over petitioners' claim, but reversed its decision on the merits (Pet. App. A2). On March 3, 1971, the government petitioned for rehearing on the basis of this Court's decision in *Schlanger* v. *Seamans*, 401 U.S. 487. Petitioner argued that *Schlanger* was not applicable and, as an alternative to habeas corpus jurisdiction, asserted that the district court had jurisdiction under the mandamus provisions of 28 U.S.C. 1361. On June 4, 1971, the court below entered a new opinion holding that under *Schlanger* the district court lacked jurisdiction since petitioner's custodian was not within the court's judicial district and rejected petitioner's mandamus argument, and remanded the case to the district court with directions to dismiss for want of jurisdiction (Pet. App. A1).

ARGUMENT

1. Petitioner alleges at the outset that this Court's decision in *Schlanger* v. *Seamans*, *supra*, is factually and legally distinguishable and, therefore, is not controlling. But here, just as in *Schlanger*, petitioner's

commanding officer was neither a resident of the judicial district in which he brought suit nor amenable to its process. In this situation, as the court below held (Pet. App. A1, 41), *Schlanger* plainly applies: the California District Court had "no custodian within its reach against whom its writ can run," which "is fatal to the jurisdiction" of that court (401 U.S. 491).

This does not mean, however, that petitioner could not maintain a habeas corpus action at all. As stated above (p. 2, *supra*), he was assigned during the delay in active service to the Reserve Components Personnel Center under the command of the RCPC Commander, in Indiana; he could have brought a habeas corpus suit there. Moreover, petitioner was under orders to report to Fort Gordon, Georgia, only four days after he filed suit in California. Once at Fort Gordon, of course, petitioner could meet the habeas corpus jurisdiction requirements for a suit there.[1] In these circumstances, petitioner must adhere to the *Schlanger* rule and bring his habeas corpus action where his custodian is located.[2]

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[1] Petitioner here in effect seeks a rule that would entitle persons who are on deferred status and have completed their schooling to assert habeas corpus jurisdiction wherever they reside, whether temporarily or permanently. In a real sense, such persons are in much the same situation as an active duty serviceman "on leave." The courts have consistently refused to allow servicemen on leave to bring suit in a district other than where their commanding officer is located. *United States ex rel. Rudick* v. *Laird*, 412 F. 2d 16 (C.A. 2), certiorari denied, 396 U.S. 918; *Jarrett* v. *Resor* 426 F. 2d 213 (C.A. 9).

[2] We think that there are important differences between *Donigian* v. *Laird*, 308 F. Supp. 449 (D. Md.), on which petitioner relies,

2. The mandamus provisions of 28 U.S.C. 1361 did not confer jurisdiction on the district court.

Mandamus is an extraordinary remedy and, as pointed out by the court below, is to be used "only in the most urgent cases" (Pet. App. A1, p. 42). *Prairie Band of Pottawatomie Tribe of Indians* v. *Udall*, 355 F. 2d 364 (C.A. 10), certiorari denied, 385 U.S. 831. It is not to be used where there is another remedy available (*Carter* v. *Seamans*, 411 F. 2d 767 (C.A. 5), such as petitioner had here by reason of a habeas corpus proceeding in a proper jurisdiction.[3]

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and the facts of this case. There, a reservist placed on inactive status and deferred while in graduate school brought a habeas corpus action in Maryland, in the judicial district where he had been attending graduate school for several years. According to the district court, Donigian was in Maryland "with permission of the Army," and would "have had to obtain the approval of the Army to transfer to another school" (308 F. Supp. at 453). These and other factors presented a "highly unusual situation" that showed that "the custody of which he [Donigian] complains relates very definitely to this district" (*ibid.*). Unlike Donigian, petitioner was in California, where he brought suit, for only a brief period before active duty, to take the bar examination, and there is no indication that he could not have gone to or lived in any state or number of states, without Army permission, while waiting to do so. Moreover, he was under orders to report for active duty in Georgia virtually from the time he left law school, so that his residence in the interim was assured of being relatively temporary and his final destination was fixed.

[3] Petitioner claims that there is no assurance that an "alternate remedy exists beyond question" (Pet. 30). We think that a habeas corpus action in a proper jurisdiction would have been available and would have provided an adequate alternative remedy (see p. 5, *supra*). While petitioner also contends

Nor could petitioner show, as required for mandamus relief, that the Army has failed to perform a wholly ministerial duty, as to which it has no discretion. See *Jarrett* v. *Resor*, 426 F. 2d 213 (C.A. 9). As in *Jarrett*, the petition here "does not allege that defendants have failed to fulfill a plainly prescribed ministerial duty. It alleges at most that in fulfilling their duty of acting upon his request for a discharge from the Army, they either abused their discretion, incorrectly found the facts, or misapplied the law" (426 F. 2d at 216–217). Cf. *Miguel* v. *Mc Carl*, 291 U.S. 442.

This is not a case like *Bluth* v. *Laird*, where there has been "a clear and unequivocal abuse of discretion" (435 F. 2d 1065, 1071 (C.A. 4)). *Bluth* involved a failure on the part of the Army to follow its own regulations when processing a request for a temporary deferment from overseas duty. The court held that while mandamus is not available to review matters committed to the discretion of the Army, the designated procedures imposed "ministerial" duties so that mandamus would issue to compel their performance. In the present case, petitioner's conscientious objector claim turned on the particular facts presented and involved a large measure of informed discretion, a

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that a habeas corpus proceeding in another state is not an "adequate" remedy (Pet. 31–34), the main thrust of this argument is that it would cost money to go to another state and generally would be more difficult to litigate a case in a different state. Though we agree with the court below that relief by habeas corpus in the federal courts of another state is "another adequate remedy" (Pet. App. A1, p. 42), this should be especially so in the present case, in view of the fact that petitioner was scheduled to be transported to his duty station in Georgia (where all habeas corpus requisites could have been satisfied) at Army expense four days after he brought suit in California.

situation in which plainly there could be no "unequivocal abuse of discretion."

3. The remaining statutory provisions relied on by petitioner (Pet. 35–38) similarly did not confer jurisdiction on the district court. The Administrative Procedure Act (5 U.S.C. 701, *et seq.*) is inapplicable, since by its own terms (5 U.S.C. 704) it provides for judicial review only where the action complained of is "reviewable by statute", or is final action "for which there is no other adequate remedy." Neither condition is met here—there is no review by statute and another adequate remedy (a habeas corpus proceeding in an appropriate jurisdiction) exists (see p. 5, *supra*). *Cf. Mohawk Airlines, Inc.* v. *Civil Aeronautics Board*, 329 F. 2d 894 (C.A. D.C.); *Richfield Oil Corp.* v. *United States*, 106 F. Supp. 1022 (N.D. Cal.), affirmed, 207 F. 2d 864 (C.A. 9); *Poirier* v. *Commissioner*, 299 F. Supp. 465 (E.D. La.).

Nor did 28 U.S.C. 1331(a) grant jurisdiction. Here, petitioner seeks to compel an official to perform a function which he is allegedly obligated, but has failed, to perform. Section 1331 has never served as a jurisdictional basis for relief of this sort, in effect the same that petitioner sought by the extraordinary remedy of mandamus. The cases that petitioner cites (Pet. 37) did not compel an official to do an affirmative act.[4]

[4] While *Wolff* v. *Selective Service Local Board No. 16*, 372 F. 2d 817 (C.A. 2), which petitioner also cites, speaks in terms

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1971.

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of Section 1331, the court purported to order affirmative action there because the local board acted "in clear excess of its jurisdiction" (372 F. 2d at 826). This, of course, is in effect the mandamus standard, so that *Wolff* may be properly considered as holding only that there might be jurisdiction under Section 1331 where mandamus jurisdiction is otherwise established. That is not the case here.

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IN THE

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OCTOBER TERM, 1971

No. 71-83

Supreme Court, U. S.
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LT. JOHN A. STRAIT,

Petitioner,

—v.—

HON. MELVIN R. LAIRD,
Secretary of Defense, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF THE PETITIONER

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IN THE

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OCTOBER TERM, 1971

No. 71-83

LT. JOHN A. STRAIT,

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Secretary of Defense, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF THE PETITIONER

I.

Summary.

The Brief of Respondents adds nothing of substance to the *per curiam* opinion of the Court of Appeals, although their more elaborate development of the issues reveals how completely the result below is divorced from reality. They argue in a legal vacuum, devoid entirely of support in fact, practical or policy considerations, or legal and legislative history. Moreover, where such factors were addressed by petitioner in his brief, respondents have ignored them, denigrated them, and distorted them, but in no instance have they offered any countervailing rationale of their own.

II.

Facts.

Respondents' presentation of the facts is frequently misleading and erroneous, as the following examples show.

1. Respondents portray petitioner as a temporary and fortuitous resident of California (Brief of Resp. 15 and 21, n. 14), whereas in truth he had been a permanent resident of Northern California since birth (Brief of Pet. 4-5 and 21), having left the state only temporarily during three academic years to attend law school.

2. Respondents analogized petitioner to a "furloughed soldier" (Br. of Resp. 21, n. 14), relying on the false assumption that he had been "assigned" to the Yale Law School and was permitted a brief interruption in that "assignment" in order to take the California bar examination. In truth, the choice of law school was entirely the petitioner's; the only restriction being that he attend "an approved and recognized institution. . . ." AR 601-25, para. 2-3(b)(1) (see Br. of Resp. 45). Respondents have developed this false analogy in order to obscure the crucial differences between this case and *Schlanger* v. *Seamans*, 401 U.S. 487 (1971). Sgt. Schlanger, who had been assigned to a functioning military unit, was indeed a furloughed soldier. Lt. Strait, on the other hand, had only a record-keeping assignment and a nominal commanding officer (Br. of Pet. 32, n. 10). Thus, the only substantial similarity between the two cases—the physical absence of the commanding officer from the district—is obscured and distinguishable.

3. Respondents depict petitioner's conscientious objector claim as presenting a close question on the merits (Br. of Resp. 29, n. 20). Yet every Army officer who interviewed Lt. Strait found him to be sincere, and a three-judge panel of the Court of Appeals unanimously found the denial of his application factually baseless and, in part, legally erroneous (App. 66-8, 72-74).

4. Respondents state that Lt. Strait did not specifically set forth the claim that his application was not processed according to Army regulations (Br. of Resp. 30, n. 21). The statement is in error; the specific irregularities are described in the Amended Petition (App. 36) and in the Brief of Petitioner, p. 7, n. 3.[1]

III.

Habeas corpus.

Respondents argue that the District Court did not have habeas corpus jurisdiction on the sole ground that the Army officer designated as petitioner's commanding officer was not physically present in the district where the petition was filed. To deny a habeas petitioner access to court

[1] Lt. Strait alleged that much of the record upon which the Army relied was created without his knowledge and therefore without his having an opportunity to respond to highly prejudicial and inaccurate information contained therein (App. 36). He has not fully developed the substance of these allegations here since that question is not before this Court. In the present posture of the case, i.e., on respondents' motion to dismiss, those allegations must be admitted as true. E.g., *Walker Process Equip. Inc.* v. *Food Mach. & Chem. Corp.*, 382 U.S. 172, 174-175 (1965). In any event these same allegations of irregularity have recently been found meritorious by the Second Circuit. *Friedberg* v. *Resor*, —— F.2d ——, 5 SSLR 3028 (2d Cir. No. 71-1573, decided 12-29-71). See also, *Crotty* v. *Kelly*, 443 F.2d 214 (1st Cir. 1971).

on such a slender thread would seem to require potent support in policy, practical needs, or legislative and legal history. There is none.

A. *No Policy Interests Are Advanced by the Result Urged by Respondents.*

Respondents urge that the commanding officer must be physically present because "effective relief depends upon the court's ability to compel the custodian to obey its mandate . . ." (Br. of Resp. 18-9). Nevertheless, respondents do not say why, in a purely federal, habeas corpus proceeding, such *physical* presence is necessary when physical presence was never relied upon to establish and maintain the bonds sought to be broken; especially when the custodian has established substantial contact with the petitioner in the district.

Indeed, respondents concede that Lt. Strait was "'in custody' within the district where [he] reside[d] pursuant to Army authorization" (Br. of Resp. 11), and that he "would be as much 'in custody' where his RCPC commander is, . . . as he would be in California when located there" (*Id.* at 23). But they say he cannot obtain judicial release from this custody unless he leaves the very place where he is restrained and establishes a new and different residence (even though the new residence need be but fleeting). This "Mexican divorce" approach to the Great Writ demeans its value and exalts form over substance without serving any legitimate policy function.

It is far more appropriate to avoid such fabricated *physical presence* requirements and to honor reality by relying upon traditional indicia of *jurisdictional presence* (Br. of

Pet. 31-2) in unattached reservist cases. Many courts have adopted this approach. *Arlen* v. *Laird,* 451 F.2d 684 (2d Cir. 1971); *Strieb* v. *Gasiewicz,* 3 SSLR 3729 (7th Cir. 1970); *United States ex rel. Armstrong* v. *Wheeler,* 321 F. Supp. 471 (E.D. Pa. 1970); *Donigian* v. *Laird,* 308 F. Supp. 449 (D. Md. 1969); *Nason* v. *Secretary of the Army,* 304 F. Supp. 422 (D. Mass. 1969); *Decker* v. *Wheeler,* 3 SSLR 3286 (D. Minn. 1970).

Respondents contend that jurisdictional presence through contacts is not adequate because the writ cannot be effected outside the issuing court's jurisdiction (Br. of Resp. 20, n. 13), but, again, they fail to say why this should be so. Moreover, they have overlooked the existence of 28 U.S.C. §1391(e), which at a minimum can be used to *effect* service of process (where the respondents are federal officers) in aid of habeas corpus jurisdiction otherwise found to exist.[2] *Smith* v. *Campbell,* 450 F.2d 439 (9th Cir. 1971); cf., *Ex Parte Endo,* 323 U.S. 283 (1944).

B. *Practical Considerations.*

Petitioner described the hardships that non-unit reservists would encounter if forced to seek judicial review of denials of discharge either in the district where the Reserve Centers are located or after they are on active duty (Br. of Pet. 41-6), and contended that such a harsh result ad-

[2] No explanation is offered why the physical congruity of a United States District Judge and a federal custodial officer is necessary to insure, or will even enhance, obedience to the writ. Undoubtedly proper and adequate service of process will encourage obedience, but Congress has said that 28 U.S.C. §1391(e) may serve this purpose in civil cases. Nevertheless initially finding jurisdictional presence independent of §1391(e) as was done here may be required to prevent an indirect expansion of the scope of 28 U.S.C. §2241 (Br. of Pet. 33).

vances no interest of the government (*Id.* 46-51). Respondents suggest that these hardship contentions are overblown (Br. of Resp. 24-5). (By their silence, however, they apparently concede that a contrary rule would have no detrimental impact on the government.)[3]

With respect to financial considerations alone, the government's brief shows a lack of sensitivity to the burdens which litigation imposes upon the average citizen. Respondents suggest that petitioner could invoke the habeas corpus jurisdiction of the district court in St. Louis, Missouri, by flying there "in a matter of hours" (Br. of Resp. 24), and that his "counsel could of course travel to the RCPC as easily as petitioner" (*Id.* at 25). They apparently do not realize that the added costs thus incurred (air fare, hotel and other travel expenses, per diem charges by counsel for each day away from his office, the expenses of retaining additional local counsel in Missouri) would put habeas corpus actions financially out of the reach of most citizens.

If a reservist cannot bear these costs, respondents contend, he can simply report for active duty at Army expense and then file his petition (Br. of Resp. 24). But, this alternative is not available to a reservist whose active duty will not commence until some future and perhaps undetermined date. E.g., *Nason* v. *Secretary of the Army, supra.* Such a non-affluent, delayed active-duty reservist would thus be

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[3] The only argument even tenuously advanced is that the rule urged by petitioner will create jurisdiction in numerous situations for "all servicemen" (Br. of Resp. 14, n. 10). No reason is offered why such a result should be disfavored; in any event the statement is an exaggeration. Lt. Strait seeks only a rule applicable to unattached, inactive reservists—a result further controlled by rules relating to venue, *forum non conveniens,* and interlocutory relief (Br. of Pet. 47-51).

relegated to a litigative limbo. And even a reservist with an immediate activation date still faces a serious problem regarding the assistance of counsel (Br. of Pet. 42-3). Must he seek and retain entirely new and unfamiliar counsel upon reporting for active duty, or will he pay to transport his present counsel across country (again at great cost)?

Nor is it true that whether petitioner must go on active duty is not in dispute (Br. of Resp. 24, n. 18). The Second Circuit answered that contention in *Arlen* v. *Laird, supra* at 687, where it rejected the notion that "the petitioner [must] leave his home and his work in order to contest the power of the Army to force him to do so." See also, *Scaggs* v. *Larsen,* 396 U.S. 1206 (1969) [Douglas, J. in chambers]; *Berman* v. *Resor,* 302 F. Supp. 1200, 1202 (N.D. Cal. 1969). At least one paramount feature of the writ of habeas corpus is its prompt availability, and this is as important in testing military restraints as in any other context. *Parisi* v. *Davidson,* —— U.S. ——, 40 U.S. Law Week 4177 (decided 2-23-72).

C. *The Potential for Serious Concentration of Cases Exists.*

Respondents cite figures and claim that the District Court where the Reserve Center is located will not become overburdened (Br. of Resp. 26-7). But they cited only conscientious objector discharge statistics for 1971, and did not offer figures for other years or for the other categories of administrative discharge which a reservist could seek.[4]

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[4] There are reported habeas corpus actions by unsuccessful reserve discharge applicants in other categories, of which the following are examples:

(*continued on following page*)

The Amici Curiae inform us that there are approximately 2,000,000 reserve servicemen assigned to the U.S. Army Reserve Components Personnel and Administration Center at St. Louis. Petitioner does not begin to suggest that even a significant number of these individuals will seek administrative discharge, or even judicial vindication of a denial of such a request. Nevertheless, post-discharge-denial habeas petitions by even a small percentage of those so assigned could easily engulf a single district court. Thus, the important *fact* is that the rule urged by respondents would create a situation of potential seriousness.

D. *Legislative and Legal History.*

The bizarre solution offered by respondents to Lt. Strait's dilemma—that he fly to St. Louis and establish a scintilla of custody there—runs exactly contrary to the paramount purpose behind the territorial jurisdiction criteria incorporated into the habeas corpus statute by Congress, namely, that petitioners be required to bring such actions where they are actually physically located in order to avoid their transportation about the country (Br. of Pet. 25-6). The very concept of itinerant habeas petitioners, travelling about the country in an effort to establish "complete" custody, defies all notions associated with the Great Writ. Indeed, the "body" referred to in respondents' view of

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1. Medical—*Patterson* v. *Stancliff*, 4 SSLR 3644 (D. Vt. 1971).
2. Individual hardship—*United States ex rel. Schonbrun* v. *Commanding Officer*, 403 F.2d 371 (2d Cir. 1968).
3. Community hardship—*United States ex rel. Hutcheson* v. *Hoffman*, 439 F.2d 821 (5th Cir. 1971).
4. Minister of religion and/or divinity student—*Barr* v. *Weise*, 293 F. Supp. 7 (S.D.N.Y. 1968), *modified*, 412 F.2d 338 (2d Cir. 1969).

habeas corpus is now apparently the body of the custodian, the petitioner having become somewhat irrelevant.

Respondents have cited no legislative or judicial history to support their theory that the presence of the custodian is a subject matter jurisdiction requirement. Their attempt now to cast *Schlanger* v. *Seamans, supra,* as a new departure (rather than a restatement of personal jurisdiction concepts) is at odds with their own contentions in that case (see Br. of Pet. 24).

In short, respondents' arguments are devoid of any foundation in the facts of this case, practical realities of a more general nature, policy considerations, or legislative history. This Court should not adopt a rule that, without serving any countervailing interest, will impose serious hardships on a significant class of habeas petitioners and thus contract the availability of the Great Writ.

IV.

Mandamus.

Petitioner's brief challenged the Ninth Circuit's view of mandamus jurisdiction under 28 U.S.C. §1361, as stated in *Jarrett* v. *Resor,* 426 F.2d 213 (9th Cir. 1970). In reply, respondents defend the Ninth Circuit's position, relying heavily, as their authority, on—*Jarrett* v. *Resor* (*id.* 28, 31 and 32). Such reasoning typifies the strength of respondents' contentions.

1. Trotting out meaningless, "ministerial-discretionary" terminology, respondents claim that the Army's decision herein is unreviewable in mandamus because it was "discretionary." But, as Chief Justice John Marshall noted, discretionary acts are "in their nature political," where

the officer or agency has acted as "the mere organ of executive will. . . ." *Marbury* v. *Madison,* 1 Cranch (5 U.S.) 137, 170 (1803). Surely, respondents do not mean that the Army's decision here was a "political" one. Rather, they must concede that the decision here is an action where the Secretary of the Army (or his designee) "is not placed under the particular direction of the president, and the performance of which the president cannot lawfully forbid. . . ." *Id.* This has remained the basic approach to executive discretion over the years and was reaffirmed as recently as last Term. See *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 410-13 (1971); Brief of Pet. 54-57.

Respondents attempt to include in the scope of "discretion" any actions that require the weighing of facts and application of law to those facts is inconsistent with that understanding The mere fact that an administrative determination is complex or difficult does not render it "discretionary" and therefore insulated from judicial review under mandamus, *Roberts* v. *United States,* 176 U.S. 221, 231 (1900); *Carey* v. *Local Board No. 2,* 297 F. Supp. 252, 254-5 (D. Conn.), *aff'd,* 412 F.2d 71 (2d Cir. 1969); although the fact that the process does require some extensive fact-finding and law-applying may make it more easily supportable on the merits, especially under the narrow, "basis-in-fact" test.[5] But this buttresses the conclusion that the

[5] It is not true as suggested (Br. of Resp. 31) that the basis-in-fact test was developed in conscientious objector cases because of special deference to the expertise of the agency. That standard applies equally to less subjective determinations of draft boards and their military counterparts. It was primarily invoked to make the system of obtaining military manpower more efficient by reducing the scope of judicial review. See, *Estep* v. *United States,* 327 U.S. 114, 128 and 133 (1945) [Murphy, J., and Rutledge, J., concurring].

scope of review here sought is in the nature of mandamus, for when even the relatively stringent basis-in-fact test cannot be met, then the military authorities, as "a mere perfunctory or ministerial matter" should have granted the discharge application. *Still* v. *Commanding Officer*, 334 F. Supp. 617, 622 (N.D. Ala. 1971).

2. Respondents' argument fails for another reason—the Army's decision was not a "close" result where the facts were carefully weighed and the law diligently applied. The record reveals that Lt. Strait in fact clearly met each of the required criteria for discharge and that the Army's determination was both legally erroneous (App. 66), see, *Rosengart* v. *Laird*, —— U.S. ——, 40 U.S. Law Week 3393 (decided 2-22-72); *Clay* v. *United States*, 403 U.S. 698 (1971), and factually baseless (App. 68).[6] The Army owed Lt. Strait a "clear duty" to decide his claim according to the law and the facts, a duty it did not perform.

3. Finally, respondents advance two technical objections to mandamus jurisdiction: (a) that the district court had discretion not to proceed in mandamus because another remedy existed and (b) that Lt. Strait did not seek the kind of relief that can be afforded in mandamus.

a. Even if a district court may discretionarily refuse to proceed in mandamus because another remedy exists, it was improper for the Court of Appeals to exercise that discretion on behalf of the district judge, particularly since the Court of Appeals did *not* find that it would have been an abuse of discretion for the district court to have pro-

[6] While the district judge disagreed, he entered no findings of fact or conclusions of law to support his order, and he was unanimously reversed on that question by the Court of Appeals.

ceeded in mandamus (App. 76). More importantly, the district court does not have such discretion. The court *must* proceed in mandamus if petitioner "has no other specific legal remedy . . ." *Marbury* v. *Madison, supra* at 169, but where a specific legal remedy (which thus becomes the exclusive remedy) exists, the court must likewise refrain. *Carter* v. *Seamans,* 411 F.2d 767, 773 (5th Cir. 1969). Here, habeas corpus is neither a specific, statutory remedy nor a legal one; it is an equitable, non-statutory remedy that stands on the same footing as mandamus. Accordingly, *Carter* v. *Seamans, supra,* relied on by both the court below and respondents, is inapposite.

b. Petitioner not only sought an order discharging him from custody; he also requested declaratory and injunctive relief (App. 37)—remedies quite consistent with his claims of procedural irregularity. But, respondents contend, since the district court could not discharge Lt. Strait from custody pursuant to its mandamus power, it should grant no relief at all (Br. of Resp. 32). Nevertheless, the court certainly has ample power under the All Writs Statute (28 U.S.C. §1651), the Declaratory Judgment Act (28 U.S.C. §§2201-2), and its inherent injunctive authority to fashion a more than adequate remedy that would sever Lt. Strait's legal obligations to the Army. Cf., *Massachusetts* v. *Laird,* 400 U.S. 886, 899 (1970) (Douglas, J., dissenting).

V.

Other remedies.

With regard to jurisdiction under the Administrative Procedure Act, the respondents' quarrel is more with the decisions of this Court than with the petitioner.

As to federal question jurisdiction, respondents concede that it provides an additional basis for jurisdiction, but they attempt to fabricate out of whole cloth a doctrine of discretionary federal question jurisdiction (Br. of Resp. 37). It is revealed as the sham it is by the complete absence of any cited authority supporting the novel suggestion.[7]

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[7] The authorities cited at p. 37, n. 25, *id.*, are inapposite. They merely restate the rule that the Declaratory Judgment Act is not an independent jurisdictional statute. They have nothing to do with 28 U.S.C. §1331(a).

CONCLUSION

For the reasons stated herein and in Petitioner's Opening Brief, Lt. Strait urges that the judgment below be reversed, and the cause remanded for re-instatement of the judgment of February 17, 1971.

March, 1972

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-83

LIEUTENANT JOHN A. STRAIT,

Petitioner,

—v.—

HONORABLE MELVIN R. LAIRD, Secretary of Defense; HONORABLE STANLEY R. RESOR, Secretary of the Army; LIEUTENANT GENERAL STANLEY LARSON, Commanding General, Sixth United States Army; MAJOR GENERAL PHILIP B. DAVIDSON, JR., Commanding General, Fort Ord, California; COLONEL JOHN H. HOFFMAN, Commanding Officer, United States Army Reserve Components Personnel Center, Fort Benjamin Harrison, Indiana,

Respondents.

BRIEF OF THE CENTRAL COMMITTEE FOR CONSCIENTIOUS OBJECTORS AND RESERVISTS COMMITTEE TO STOP THE WAR, *AMICI CURIAE*

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Interest of *Amici**

The Central Committee for Conscientious Objectors is a nationwide, non-partisan organization, founded in 1948, dedicated to the protection of the rights of individuals

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* Letters of consent from the petitioner and the respondent to the filing of this brief pursuant to Rule 42(2) have been filed with the Clerk of the Court

charged with the obligation of satisfying the manpower needs of the armed forces. It has provided educational aids to lawyers and lay advisors to persons subject to the draft, as well as counselling and legal assistance to young men with military or draft problems, especially those who have raised conscientious objections to active military service.

The Reservists Committee to Stop the War is a national organization of military reservists and National Guardsmen particularly concerned with furthering the rights and interests of members of the armed services through counselling, representation and litigation. The Committee was the successful plaintiff in *Reservists Committee to Stop the War* v. *Laird*, 323 F. Supp. 833 (D.C.D.C. 1971), which held that members of Congress are ineligible to hold a commission in the Armed Forces Reserve during their continuance in office.

In their efforts to provide assistance to men in the military, both the Central Committee for Conscientious Objectors and the Reservists Committee to Stop the War have a common and substantial concern that all legal remedies, such as the writ of habeas corpus, remain available to vindicate the just claims of servicemen. The accessibility of the courts for the assertion of rights will be seriously restricted for an enormous class of military personnel if the conclusions reached in *Schlanger* v. *Seamans*, 401 U.S. 487 (1971), are extended to the class of litigants represented by Lieutenant Strait. Such a result would work severe financial hardship upon many prospective litigants and, in view of the general increase in the number of military claims raised by way of habeas corpus, would produce a serious concentration of such petitions in the District Court for the Eastern District of Missouri.

The *amici* submit that factual differences between the *Schlanger* and *Strait* cases justify a result in this case which will enable unattached military personnel in an inactive status to continue to have access to more than one federal court.

Argument*

In *Schlanger* v. *Seamans, supra,* this Court considered the situation of an active-duty serviceman with a regular duty station located in a jurisdiction distant from the one in which he brought his habeas corpus petition. Schlanger was on temporary assignment in Arizona, while his commanding officer resided in Georgia. The Court found that, on the facts presented, there was no proper respondent within the jurisdiction of the district court and thus that the court lacked jurisdiction to consider the petition.

The question specifically left undecided in *Schlanger,* and presented here, is whether an unattached military reservist in an inactive status is subject to the presence of his "commanding officer" in the jurisdiction in which he resides and has brought his petition.

The result of extending the *Schlanger* rule to unattached reservists in an inactive status would be to concentrate a potentially enormous number of habeas corpus petitions brought by that class of litigants in a single court, in the Eastern District of Missouri. As one Court of Appeals has held, the government has no substantial interest in so pyramiding a mountain of habeas petitions, *Arlen* v. *Laird,*

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* All factual material contained herein is based on official, publicly-available printed materials provided to counsel for *amici* by the Department of the Army, Office of the Adjutant General, Washington, D.C., and the United States Army Reserve Components Personnel and Administration Center, St. Louis, Missouri.

—— F.2d —— (Slip Op. 223) (2d Cir. October 28, 1971); and the interests of prospective litigants and the courts themselves clearly require a different result.

The United States Army Reserve Components Personnel and Administration Center ("RCPAC"), located in St. Louis, Missouri, is currently responsible for maintaining the records and files of all Army reservists.* Similar record-keeping centers for inactive reserve personnel are maintained by other branches of the Armed Services.**

RCPAC was established in 1919 in Washington, D.C., primarily for maintaining records relating to military personnel who served in the Mexican border conflict. Since its establishment, RCPAC has been relocated from time to time. In 1942 it was located in High Point, North Carolina, and it was moved to St. Louis in 1945 and to its current location there in 1955. During this period, RCPAC maintained records relating primarily to persons who had served in the various wars.

In 1962, RCPAC assumed the responsibility for administering the records of the Standby and Retired Reserves. In 1965, with the discontinuance of the administrative responsibilities of the 14 U.S. Army Corps and the Alaskan and Southern Commands, RCPAC additionally assumed the administration of the records of the Non-Unit Ready Reserve. Commencing in March of 1971, the final step in a sweeping consolidation of the Army's reserve record-keeping system at RCPAC was completed with the authorization

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* At the time Lieutenant Strait brought his petition, the records for ROTC officers on a delayed service status were maintained at the U.S. Army Reserve Components Personnel Center at Fort Benjamin Harrison, Indiana. As is discussed *infra*, this is no longer the case.

** The Navy's record-keeping center is located in Bainbridge, Maryland, and the Air Force's, in Denver, Colorado.

to merge with it the center located at Fort Benjamin Harrison, Indiana, which had performed similar functions for various components of the Army Reserve. This consolidation now has been effected.

Throughout this period of time, RCPAC gradually has phased out its former record-keeping functions with respect to individuals with a former but no present military affiliation, transferring these to other branches of the government.*

As a consequence of this process of consolidation of unattached inactive status reservists and transfer of non-military functions to other centers, RCPAC now has record keeping and nominal administrative responsibility for *approximately 2,000,000 servicemen,* including all Army personnel not on active duty and not attached to a specific reserve unit. Of this number, approximately 1,000,000 are members of the Individual Ready Reserve, 400,000 are members of the Standby Reserve and 300,000 are members of the Retired Reserve.**

Each of these 2,000,000 persons is an unattached, inactive reservist, in the same position with respect to the armed services as Lieutenant Strait. The vast majority of these individuals have had no direct contact with the Army during the period for which they have been assigned to RCPAC other than at their residences scattered throughout the nation. An extension of the *Schlanger* rule under these circumstances would suddenly thrust upon the District Court for the Eastern District of Missouri the prospect of

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* At the present time, the National Personnel Record Center, an agency of the General Services Administration which is also situated in St. Louis, maintains (with certain exceptions) the records of all former Army, Air Force, Marine Corps, Navy and Coast Guard personnel who no longer have a military status or are deceased.

** These figures do not reflect the increased numbers brought about by the most recent merger with the Indiana center.

a very significant mushrooming of its caseload, without any compensating considerations in favor of such a concentration.

Under Army procedures, all dealings with these individuals customarily are conducted only by mail or by representatives of the Army in the localities in which each of these individuals resides. In cases such as Lieutenant Strait's, fact-finding missions are conducted in the area of the serviceman's residence. In most cases, therefore, the hearing officer of the Army is assigned from and himself resides in the district in which the petitioner raises his claims. Only the barest record of essential facts is kept and considered at RCPAC.

This process of centralization of record-keeping and administrative functions by the Army does not justify a massive dislocation of judicial economies or drain upon litigants' financial resources, nor any restriction upon citizens' access to local federal courts.

The purposes for which RCPAC was organized do not suggest a different conclusion. The Center was developed to provide centralization of administrative controls and greater efficiency in record-keeping and administrative procedures; and it was also intended to improve the Army's capability to mobilize, if needed, the individual, unattached reservist. None of these activities involve anything resembling day-to-day orders given by a commanding officer to a serviceman, of the type to which Schlanger was subject in Georgia but not in Arizona. RCPAC exists primarily to maintain continental mobilization capabilities.

The contacts between literally millions of servicemen and a record-keeping computer at RCPAC are too slender to require that all petitions such as the one involved in this case be brought in the Eastern District of Missouri only.

CONCLUSION

For the reasons set forth above, *amici curiae* respectfully urge the Court to grant the relief requested by the petitioner, reversing the judgment of the Court of Appeals and remanding with instructions to reinstate the judgment and opinion of February 17, 1971.

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Secretary of Defense, *et al.*,

Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-83

LT. JOHN A. STRAIT,

Petitioner,

—v.—

HON. MELVIN R. LAIRD,
Secretary of Defense, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE PETITIONER

Opinions Below

The opinion of the court of appeals announcing the judgment below is reported at 445 F.2d 843 (9th Cir. 1971). The earlier opinion, filed on February 17, 1971 but thereafter vacated, is reported at 3 Selective Service Law Reporter (SSLR) 3784 and is printed in the Single Appendix at pp. 59-70. The opinion of the district court dated June 24, 1970, is reported at 3 SSLR 3152 (N.D. Cal. 1970).

Jurisdiction

The final judgment and opinion below was filed on June 4, 1971. A Petition for Writ of Certiorari was filed on July 15, 1971. Certiorari was granted on November 16, 1971. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Did the district court have jurisdiction under 28 U.S.C. §2241(a) to hear and determine a petition for writ of habeas corpus brought by an Army Reservist who, with the consent of the respondents, resided within the territorial confines of the district, but whose military records were maintained at a nation-wide reserve personnel center located in another state?

2. Does the Mandamus and Venue Act of 1962 provide a method of reviewing, under the basis-in-fact test, military administrative determinations, and does the court of appeals' construction of the scope of review and extraordinary nature of the remedy created therein undermine the intent of Congress expressed in 28 U.S.C. §1361?

3. Did the district court have jurisdiction under other statutes providing for judicial review of federal administrative actions—namely, the Administrative Procedure Act, 5 U.S.C. §§701-704 and the federal question statute, 28 U.S.C. §1331(a)?

Constitutional, Statutory and Regulatory Provisions Involved

The full text of the constitutional, statutory, and regulatory provisions involved herein is set forth in the Appendix to this brief, *infra* at pp. 69-79. The cited provisions are as follows:

Constitution of the United States:

Article I, Section 9 (Habeas Corpus);

Fifth Amendment (Due Process).

Statement of the Case

Petitioner, Lt. John Strait, is an unattached, non-unit Army Reserve Officer not on active duty, seeking review of an administrative action by the Army denying his request for conscientious objector discharge.

Lt. Strait accepted a commission as a reserve officer upon his graduation from the University of California in June, 1966, after having completed the ROTC program (A. 4).* The Army then permitted Lt. Strait to proceed to law school at Yale University in New Haven, Connecticut, and consequently also postponed his active duty obligation for the duration. During this period of deferment, his military records were housed at a nationwide record-keeping center for non-unit Army reservists, the United States Army Reserve Components Center [hereinafter Reserve Center][1] (*Id.*). Lt. Strait was not compensated

[1] Each branch of the Armed Services maintains a similar record-keeping center for reserve personnel who are not assigned to functioning reserve units for training purposes. The Army's reserve

* "A.—" refers to the Single Appendix filed with the Court.

by the Army, nor was he required to attend any training functions, such as unit drills or summer encampments (A. 5). Since birth Lt. Strait maintained his permanent residence in the Northern District of California where he paid local taxes, had his bank account, and was registered for the draft. He temporarily left that domicile only during those months of the school years during which he was in attendance at law school in Connecticut (A. 34). In June 1969, Lt. Strait completed law school and came home in order to take the California bar examination, pursuant to his delay-status agreement with the Army (*Id.*). Accordingly, an active duty reporting date of February 9, 1970 was established (A. 57). Those orders were later amended, at Lt. Strait's request, to allow him to re-take the bar exam, his first effort having been unsuccessful (A. 34, 57). The Army ultimately ordered him to commence his active service at Ft. Gordon, Georgia on April 13, 1970 (A. 57).

Following the acceptance of his commission, Lt. Strait received all his orders from the Army in written communications addressed to him in San Francisco, including orders to take a physical there (A. 34). His active duty orders directed him to proceed from San Francisco to his new active duty station, and travel vouchers were issued to him in San Francisco for that purpose (A. 39, 44).

While in San Francisco, Lt. Strait developed increasingly irreconcilable conflicts of conscience about his active service obligation. When his cousin, a conscientious ob-

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center was located at Ft. Benjamin Harrison, Indiana, when this action commenced, but was recently re-located in St. Louis, Missouri. The Navy's Center is located in Bainbridge, Maryland; the Air Force's in Denver, Colorado. *See*, Brief of The Central Committee for Conscientious Objectors and Reservists Committee to Stop the War, *Amici Curiae* filed herein.

jector, committed suicide in November 1969, Lt. Strait's uncertainties ceased (A. 7). He then resolved to submit an application for discharge from the Army on grounds of conscientious objection, pursuant to Army Regulation 135-25 (*Id.*).

He prepared his application and gathered letters of support in December 1969. He submitted the application to the Reserve Center in Ft. Benjamin Harrison on January 20, 1970 (A. 5). The Army then implemented the provisions of paragraph 7.c. of AR 135-25 which provides that "[a]rea commanders will provide assistance upon request from the . . . Reserve Components Personnel Center . . . to arrange for necessary interviews of non-unit reservists residing in their geographical area of jurisdiction" (A. 18). Pursuant to this provision Lt. Strait was directed by subordinates of Lt. Gen. Stanley Larsen, the United States Sixth Army Area Commander, a respondent herein, to appear for the required interviews and hearings at Ft. Ord, California, a major Army base located near San Francisco and within the territorial limits of the Northern District of California (*Id.*).

Between February 18 and 20, 1970, interviews and hearings were held at Ft. Ord. Lt. Strait was counseled as to his legal rights (A. 20), interviewed by a psychiatrist and a chaplain (A. 22-23) and given an O-3 hearing (A. 24-26). Each of the interviewing officers made findings favorable to Lt. Strait and the O-3 Hearing Officer specifically recommended that his request for discharge be granted[2] (A. 26).

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[2] Under AR 135-25 the principal fact-finder is an officer who presides at a hearing where the applicant appears (with witnesses and counsel, if he so desires). The regulation provides that this officer must have a rank of O-3 or higher; hence, the hearing is

These reports were then sent by the Sixth Army to the Reserve Center in Indiana. The review procedure that occurred there was summarized by the court below in its vacated opinion of February 19, 1971, as follows (A. 65):

> "At Fort Benjamin Harrison appellant's record was first reviewed by a lieutenant colonel, chief of the Delayed Officer Management Division, acting in the capacity of appellant's immediate commander. His report recommended disapproval, citing appellant's political activities and concluding that the chaplain and the hearing officer 'erred or were misled in their determination that [his] beliefs were religious in origin.'
>
> The Review Board then acted and, with three members out of fifteen participating, recommended disapproval for these reasons:
>
> 1. That appellant's beliefs were not truly held.
> 2. That they were not religiously founded but reflected political, sociological and philosophical views and a personal moral code.
> 3. That appellant's objections to war were confined to this particular war."

On April 7, 1970, the Army notified Lt. Strait of its decision[3] by a letter mailed to his home in San Francisco

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commonly referred to as the "O-3 hearing" and will be here. AR 135-25, para. 7.b.(3). The Chaplain and psychiatrist are not permitted to make recommendations on the conscientious objector claim. AR 135-25, para. 7.b. Their function is limited to making factual findings within their areas of expertise.

[3] The commanding officer of the Reserve Center is delegated the responsibility for making the final decision on behalf of the Army

(A. 10). He immediately filed a petition for review of this action in the United States District Court for the Northern District of California where he lived and worked (A. 4-17).

The moving papers, filed in the district court on April 9, 1970, were entitled "PETITION FOR WRIT OF HABEAS CORPUS; FOR MANDAMUS; FOR DECLARATORY RELIEF AND MOTION FOR A TEMPORARY RESTRAINING ORDER" (A. 4). In the petition, Lt. Strait requested the court to declare him entitled to a separation from the Army as a conscientious objector, to issue a writ of habeas corpus discharging him from the custody and control of the Army, and to restrain the Army from requiring him to report for active duty (A. 15-16).

The court issued an order to show cause on April 10, 1970, and ordered "that the petitioner remain within the jurisdiction of this Court, that he not be assigned duties inconsistent with the provisions of AR 135-25" (A. 30). The order to show cause was returnable on April 24, 1970, but subsequently the matter was continued by stipulation to June 12, 1970 (A. 2). On the basis of documents which had come into his possession after he filed the original petition, Lt. Strait filed an amended petition on May 11, 1970 (A. 33-38).

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with respect to conscientious objector discharge applications of reservists. The Review Board's function is to prepare findings and to submit them, together with a recommendation, to the commanding officer. AR 135-25, para. 7.h. In this case the review board's findings were apparently prepared on April 3, 1970, and approved and accepted by the commander on April 7, 1970 (A. 40, 42). Lt. Strait, however, was not formed of, nor offered an opportunity to rebut these findings before final action was taken thereon; nor was he informed of the adverse comments of the Chief of the Delayed Officer Management Division of the Reserve Center which were considered and largely adopted by the Review Board (A. 41-42).

On June 11, 1970, respondents filed a return on the show cause order and a motion to dismiss, alleging that the court lacked jurisdiction because Lt. Strait was not assigned to a unit within the district (A. 51-52). The motion to dismiss was argued on June 12, 1970, and on June 26, 1970, the court denied the motion in a memorandum opinion, holding that it had jurisdiction to adjudicate the substantive issues (A. 52-53).

Thereafter, on July 22, 1970 the respondents filed a return and answer (A. 54-57), and the matter was argued on the merits on July 24, 1970 (A. 2). On July 28, 1970 by minute order, the district court denied relief, ruling against Lt. Strait on the merits of his conscientious objector claim (A. 58).

The petitioner then appealed to the Court of Appeals for the Ninth Circuit (A. 2), and the respondents filed a cross-appeal directed to the district court's jurisdictional holding (A. 3). On February 17, 1971 the court of appeals entered its opinion (A. 59-70). First, agreeing with the district court, it held that there was jurisdiction under the habeas corpus statute to hear the petitioner's claims (A. 61-64), 3 SSLR at 3785. The court of appeals then proceeded to a consideration of the merits and concluded that there was no basis in fact for denying Lt. Strait's conscientious objector discharge application. Accordingly it reversed the judgment of the district court and granted the writ (A. 68).

On March 23, 1971 this Court decided *Schlanger* v. *Seamans,* 401 U.S. 487 (1971), and the respondents herein filed a petition for rehearing on the basis of *Schlanger*. The court of appeals requested a response from Lt. Strait who argued that *Schlanger* was distinguishable. In addition,

he briefly mentioned other jurisdictional statutes which had been pleaded in but not reached by the District Court and requested the opportunity to further brief and argue those alternate jurisdictional theories in the event the Ninth Circuit decided to apply *Schlanger*. On June 4, 1971, the court of appeals, without allowing additional briefing or argument, entered a new judgment and opinion ordering the action dismissed (A. 71-74). It held (1) that Lt. Strait's only remedy to challenge the denial of his discharge application was by way of habeas corpus, explicitly rejecting the availability of mandamus jurisdiction pursuant to 28 U.S.C. Section 1361 and (2) that since the petitioner's "custodian"—the commander of the Reserve Components Personnel Center at Fort Benjamin Harrison, Indiana—was physically outside the jurisdiction of the District Court, habeas corpus jurisdiction was not complete (A. 73). The court ignored the Administrative Procedure Act and federal question jurisdictional issues.

Summary of Argument

I.

Lt. Strait, an inactive, non-unit-assigned, Army Reservist, petitioned the United States District Court for the Northern District of California for review of a decision of the Army denying his request for conscientious objector discharge. Lt. Strait invoked the jurisdiction of the district court pursuant to the powers of judicial review provided by the habeas corpus, mandamus, and federal question statutes, 28 U.S.C. §§2241, 1361, and 1331, as well as the Administrative Procedure Act, 5 U.S.C. §§701-704. The court of appeals held that the absence of the petitioner's nominal custodian (the commander of a nationwide record-keeping

center) from the district deprived the district court of jurisdiction to entertain the petition in habeas corpus, and it refused to entertain seriously the other jurisdictional bases pleaded. That decision was in error.

A petition for habeas corpus is the traditional vehicle for seeking judicial review of the military's refusal to grant such discharges, e.g., *Negre* v. *Larsen,* 401 U.S. 437 (1971) and because of the potential restraints which can be imposed the remedy is available to reservists as well as those on active duty. *Hammond* v. *Lenfest,* 398 F.2d 705 (2d Cir. 1968). In the case of inactive duty reservists, those restraints are felt where the reservist resides, and that District has jurisdiction to entertain the petition as the Second Circuit has specifically held. *Arlen* v. *Laird,* —— F.2d ——, 4 SSLR 3692 (2d Cir. 1971).

This Court's decision in *Schlanger* v. *Seamans,* 401 U.S. 487 (1971) does not require a contrary result, as the Ninth Circuit believed. Many factors distinguish the two cases. *Schlanger* involved an active duty Air Force member assigned to a functioning unit in Georgia on temporary leave in Arizona where he filed his petition. Lt. Strait, like thousands of other such reservists, has never been on active duty, is assigned to no functioning military unit, and has never been physicially present at Fort Benjamin Harrison, Indiana, where the Army Reserve Components Personnel Center was located. Nor will he ever be located in St. Louis, Missouri, where the Reserve Center is now located and where Lt. Strait's nominal commander can be found. He was a legal resident of the Northern District of California and resided there with the Army's permission. Indeed, all the hearings and interviews in connection with his discharge application were held there.

The holding below also departs from the background of case law and statutory interpretation against which *Schlanger* was decided. Decisions of this Court which have involved the issue of the territorial limits of the Great Writ concerned the problem of transporting petitioners to remote districts. See, *e.g., Ahrens* v. *Clark,* 335 U.S. 188 (1948). More recently, the lower federal courts, in dealing with novel multi-state jurisdictional issues in the habeas corpus context, have given the statute a flexible reading and have interpreted those earlier decisions such as *Ahrens* v. *Clark, supra,* as accordingly being based primarily on venue considerations. *E.g., Word* v. *North Carolina,* 406 F.2d 352 (4th Cir. 1969); *United States ex rel. Meadows* v. *New York,* 426 F.2d 1176 (2d Cir. 1970).

These decisions point the way to a rule herein that is consistent with *Schlanger,* a case which involved the personal jurisdiction problem created by the total absence of any custodian, vicariously or otherwise, in the district where the petition was filed. Criteria can be developed to determine whether, as here, the restraint is substantially related to the district and whether the nominal custodian was jurisdictionally "present" in the district. See, *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945); *Arlen* v. *Laird,* —— F.2d ——, 4 SSLR 3692, *supra.* Moreover, once these criteria are satisfied, actual service of process may be effected either pursuant to the provisions of 28 U.S.C. §1391(e), see, *United States ex rel. Armstrong* v. *Wheeler,* 321 F. Supp. 471 (E.D. Pa. 1970), or by service within the district made upon the local area commander who acted as the agent of the petitioner's commander in Indiana for the relevant discharge proceedings.

Finally, the ruling below will undermine the swiftness and certainty with which habeas corpus must be available,

and will effect a temporary suspension of the writ, a consequence forbidden by Article I, Section 9 of the Constitution. *Price* v. *Johnston,* 334 U.S. 266 (1948).

II.

The rule urged by the petitioner minimizes hardship to reservists in his position and imposes no significant inconvenience upon the Government. Respondents, however, have argued that such petitioners should either travel to the district where their command center is located and litigate there, or report to active duty—thereby assuming the very status which is being contested—and bring their writ in that district. Either suggestion is extremely burdensome to the petitioners while advancing no important government interests.

Requiring a reservist to report for active duty in a strange and distant community in order to litigate his right to release will seriously handicap his ability to do so. To impose this on a conscientious objector is even more harsh. The alternative of a preactivation petition in Indiana is equally cumbersome and time-consuming, when a matter of a few days can make a substantial difference in obtaining a meaningful remedy. Finally, *Ahrens* v. *Clark, supra* makes it uncertain that a petitioner such as Lt. Strait could even bring a habeas corpus application in Indiana, a district where he has never been and never will be.

On the other hand, allowing these reservists a forum where they reside will cause no significant inconvenience to the Government. The Government has counsel everywhere, these cases are usually heard on the administrative record, and statutory and decisional rules exist to prevent

forum shopping. Since petitioners like Lt. Strait are not part of any functioning military unit, any judicial stays of activation granted in the sound discretion of the court will impose minimal difficulties on the military services.

III.

Lt. Strait also pleaded jurisdiction pursuant to the Mandamus and Venue Act of 1962, 28 U.S.C. Sections 1361 and 1391(e). The court of appeals held that mandamus was not available in this case to review the administrative determinations. Its view of the proper scope of federal mandamus jurisdiction is erroneous and defeats the congressional policies of making it more convenient for citizens to challenge alleged illegal government actions.

The Army's denial of Lt. Strait's conscientious objector discharge application was not a "discretionary" determination unreviewable by the courts. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971). Whatever discretion may have existed was exercised when the Secretary of Defense promulgated conscientious objector regulations. Once passed, those regulations must be adhered to, and agency decisions in contravention of the regulations can be challenged by mandamus. See *Ferry* v. *Udall*, 336 F.2d 706 (9th Cir. 1964). If the denial of such a discharge is "without basis in fact," then the agency failed to perform a clear duty owed the petitioner, *i.e.*, the duty to base its decision on legal criteria. Cf., *Estep* v. *United States*, 327 U.S. 114 (1946).

The court below failed to apply these principles of administrative mandamus because it confused them with the stricter requirements of judicial mandamus. See, *Pacific Car and Foundry Co.* v. *Pence*, 403 F.2d 949 (9th Cir. 1968).

Nevertheless, even under those stricter criteria, the court below should have exercised its "sound discretion" and directed the district court to entertain the mandamus application.

Moreover, the existence of the extraordinary remedy of habeas corpus will not foreclose mandamus relief since neither is a legal remedy; hence, the two are equally available. *United States ex rel. Schonbrun* v. *Commanding Officer*, 403 F.2d 371 (2d Cir. 1968). See also, L. Jaffe, *Judicial Control of Administrative Action* 177 (1965). Therefore the potential existence of the habeas corpus remedy suggested by the government—namely litigation in one of two distant districts—does not justify the withholding of mandamus relief.

IV.

Jurisdiction exists under two other statutes alleged below, the Administrative Procedure Act, 5 U.S.C. Sections 701-04, and the provision conferring federal question jurisdiction, 28 U.S.C. Section 1331. The A.P.A. has long been held to be available as an alternative to habeas corpus in cases like this. See *Brownell* v. *Tom We Shung*, 352 U.S. 180 (1956). Similarly, the criteria for jurisdiction under Section 1331—a substantial federal question and the jurisdictional amount—are also met. This provision has been used to challenge analogous selective service decisions denying conscientious objector claims, see *Oestereich* v. *Selective Service System Local Board No. 11*, 393 U.S. 233 (1968), and there is no persuasive reason why this jurisdictional statute should not be equally available here.

In sum, the petitioner contends that the district court had jurisdiction under any of the bases pleaded to entertain his application.

ARGUMENT

I.

The District Court had jurisdiction under the habeas corpus statute, 28 U.S.C. Section 2241, to hear and determine the petitioner's claim for release from the United States Army.

The courts below disposed of the case by focusing on the habeas corpus issue, i.e., whether the United States District Court for the Northern District of California had jurisdiction to consider the habeas corpus application of an Army Reservist who, with the consent of the Army, resided within the territorial confines of that district, but whose military records were maintained at a nationwide reserve personnel center located in another state. Relying upon this Court's decision in *Schlanger* v. *Seamans, supra,* the court of appeals held that jurisdiction was lacking because the petitioner's custodian was not physically in the district. This conclusion is not required by the *Schlanger* decision, nor by the background of the modern development of habeas corpus jurisdiction against which it was decided, nor by any policy interests which should inform this Court's interpretation of the statute.

The traditional vehicle for judicial relief to unsuccessful military discharge applicants has been a petition for writ of habeas corpus, e.g., *Negre* v. *Larsen,* 401 U.S. 437 (1971); *Hammond* v. *Lenfest,* 398 F.2d 705 (2d Cir. 1968).[4] Habeas

[4] Habeas corpus has not been exclusively employed, however. See, *Still* v. *Commanding Officer,* —— F. Supp. ——, 4 SSLR 3785 (N.D. Ala. 1971); *United States ex rel. Clements* v. *Laird,* 3 SSLR 3863 (D. Md. 1971); *United States ex rel. Olsen* v. *Laird,* 3 SSLR

corpus jurisdiction rests by virtue of the potential restrictions the military can impose, even though a serviceman is not in actual physical custody. *Johnson* v. *Laird*, 435 F.2d 493 (9th Cir. 1970); *Hammond* v. *Lenfest, supra* at 711. While this concept of figurative rather than physical custody bothered some courts a few years ago, e.g., *Chavez* v. *Fergusson*, 266 F. Supp. 879 (N.D. Cal. 1967), *appeal dismissed as moot*, 395 F.2d 215 (9th Cir. 1968), a series of decisions by this Court which expanded the concept of custody generally, e.g., *Carafas* v. *La Vallee*, 391 U.S. 234 (1968); *Peyton* v. *Rowe*, 391 U.S. 54 (1968); *Jones* v. *Cunningham*, 371 U.S. 236 (1963), eventually resolved these doubts. A new category of territorial jurisdictional questions has arisen in the wake of this expansion of the Great Writ—questions that were virtually inconceivable a decade ago.

A "new class of petitioners" (A. 63) now exists wherein the persons restrained or detained are physically located, often quite permanently, in a district entirely separate from that of their custodians. The jurisdictional statute, 28 U.S.C. §2241(a), drafted prior to the appearance of this class of litigants, thus necessarily failed to consider this possibility. Hence the courts must define the geography of habeas corpus jurisdiction for these new petitioners by reference to the original Congressional intent behind Section 2241 and its predecessors, which was directed primarily at the problems of transporting prisoners from one

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3774 (M.D. N.C. 1970) [Mandamus]; *Berman* v. *Resor*, 302 F. Supp. 1200 (N.D. Cal. 1969) [Declaratory Relief and A.P.A.]; cf. also, *Oestereich* v. *Selective Service System, Local Board No. 11*, 393 U.S. 233 (1968); *Wolff* v. *Selective Service Board No. 16*, 372 F.2d 817 (2d Cir. 1967) [Pre-induction review under 28 U.S.C. §1331(a)].

district to another. *Ahrens* v. *Clark,* 335 U.S. 188, 191 (1948). Since this problem is obviously not relevant to military reservists, the Court is presented with a dilemma.

The closest the Court has come to facing this dilemma was in *Schlanger* v. *Seamans,* 401 U.S. 487 (1971), decided last term. But *Schlanger* was a factually unique case realistically having little bearing on the issues presented herein, as the Second Circuit concluded in *Arlen* v. *Laird,* —— F.2d ——, 4 SSLR 3692 (2d Cir. 1971). Because it is unique, *Schlanger* should be narrowly construed, lest its broader implications result in succeeding cases that are inconsistent with the purposes of the Great Writ.

A. *The Ruling in* Schlanger v. Seamans *Is Inapplicable to the Situation of an Unattached Inactive Duty Reservist Who Is Technically Commanded From a Central Record Keeping Center in a Remote District.*

In *Schlanger* v. *Seamans, supra,* the Court held that a district court where an active member of the Air Force was on leave did not have jurisdiction to hear his habeas petition because his commanding officer could not be found to be present in the district, even vicariously.

1. Active v. Reserve Duty.

Consider the significant differences in the military status of Sgt. Schlanger and Lt. Strait: Sgt. Schlanger, on active duty in the Air Force, had been assigned to and was physically present at, and performing military duties as a member of, an active functioning unit at Moody Air Force Base, Georgia, for approximately nine months prior to the temporary leave which took him to Arizona (*Schlanger* v. *Seamans,* Brief of Resp. 7-9); Lt. Strait was not on active

duty, and has never been a member of a functioning military unit, nor had he ever been physically present at Ft. Benjamin Harrison, Indiana, and his military orders never contemplated that he ever would be present there. On the contrary he had been physically present in the Northern District of California for ten consecutive months prior to filing his petition, and for most of his life before that.

Orders restraining the Air Force from returning Sgt. Schlanger to Georgia not only removed him from his unit where he had a specific duty assignment, but also effectively deprived the Air Force of his services for a substantial portion of his obligated period of active service. Orders restraining Lt. Strait's commencement of active duty merely prevented his preliminary active training at a particular moment in time. He still retained his full two-year active duty obligation, subject to the final outcome of his case on the merits.

The relative hardships to be suffered by active duty servicemen and reservists generally are also quite different, as will be developed fully below. See pp. 39-46, *infra*. When he was unable to obtain a forum in Arizona, Sgt. Schlanger returned to his unit in Georgia, resumed his duties and refiled his petition there (*Schlanger*, Brief of Resp. 12, n. 13). Under respondents' view of this case, however, the typical reservist will be forced to disrupt his life and perhaps undergo the significant change of status involved in reporting for active duty. *Scaggs* v. *Larsen*, 396 U.S. 1206 (1969) [Douglas, J. in chambers]; *Berman* v. *Resor*, 302 F. Supp. 1200, 1202 (N.D. Cal. 1969); see also pp. 41-43, *infra*.

2. Availability of a Forum.

In *Schlanger,* the government emphasized that "at all pertinent times" Sgt. Schlanger had "... a suitable forum for habeas corpus ..." available to him, *i.e.,* his assigned duty station in Georgia (*Schlanger,* Brief of Resp. 13). Here, however, there is a substantial question as to whether unattached reservists controlled from a command center in a remote district have any forum at all until they report for active duty, in view of this Court's earlier holding that the presence of the petitioner is a non-waivable habeas corpus jurisdictional requirement. *Ahrens* v. *Clark, supra.* See pp. 45-46, *infra.* Hence, an action at the site of the Reserve Center may be barred.

Nevertheless, even if the physical presence of the petitioner is not required, and such a forum exists in the district where the reserve center is located, there is a considerable question whether habeas corpus in a distant state is a *"suitable"* forum that is *"available at all pertinent times."* In this case, as in *Donigian* v. *Laird,* 308 F. Supp. 449 (D. Md. 1969), Lt. Strait learned of the Army's adverse decision less than a week before his anticipated active duty reporting date (at a post 3000 miles across the country), leaving inadequate time to have filed a habeas petition in Indiana. Moreover, regardless of the action taken by an Indiana court as regards interlocutory relief, either party would be greatly inconvenienced. If the court granted relief, then Lt. Strait and/or his counsel would have to travel to court for hearings from San Francisco, or, if the court denied temporary relief, the Army might be required to provide for Lt. Strait to make such appearances from his duty station in Georgia.

Furthermore, only a small number of reservists would find such a forum adequate, *i.e.*, those who have both the resources and sufficient time available prior to reporting for active duty to initiate a timely habeas corpus action. Ironically, this same class of petitioners would also suffer the most if *Ahrens* v. *Clark, supra,* were applied literally to foreclose them from bringing habeas corpus actions where they do not reside, since they would then have no forum for a substantial period of time. Cf. *Still* v. *Commanding Officer,* —— F. Supp. ——, 4 SSLR 3785 (N.D. Ala. 1971).

It is quite conceivable, therefore, that, regardless of the nature and/or similarity of their claims, three arbitrary jurisdictional sub-classes among reservists could be created:

1) a reservist attached to a unit in the district of his residence would be able to commence an action where he lives, whether or not he is under activation orders;

2) an unattached reservist with no activation orders would be limited exclusively to the possibility of petitioning in the single district where his service's Reserve Center is located; and

3) an unattached reservist with activation orders would realistically be limited to reporting for active duty prior to seeking judicial review, except in a few rare cases.

Certainly such a result not only would "ignore reality," *Arlen* v. *Laird,* —— F.2d ——, ——, 4 SSLR at 3694 (2d Cir. 1971), but would also exalt form over substance. *Donigian* v. *Laird,* 308 F. Supp. 449, 452 (D. Md. 1969).

3. Absence of Forum Shopping.

Schlanger v. *Seamans, supra,* had overtones of forum shopping; indeed, the government reserved the right to seek a transfer to a more convenient forum (*Schlanger,* Brief of Resp. 34-5). However, in the typical reservist case, as here, all possible venue and convenience requirements are easily satisfied in the reservist's home district.[5] Lt. Strait, for example, quite obviously both resided and was domiciled in the Northern District of California. It was his permanent home of record;[6] he lived there, banked there, paid taxes there, and was registered for the draft there (A. 34); all communications from the Army were addressed to him there (A. 19, 27, 39, 44, 46, 47); the administrative proceedings under review largely took place there (A. 18, 20-26); and his physical presence there was not only authorized by the Army but was integrally related to his educational delay, being the culmination of his legal studies (A. 4-5, 34).

Consequently, the spectre of "forum shopping" is not present in this case, nor have respondents ever suggested otherwise.

These crucial distinctions, between the highly unusual situation in *Schlanger* and the normal case of the unattached reservist represented here, were relied upon by the Second Circuit in *Arlen* v. *Laird, supra,* a case virtually

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[5] In the untypical case, the courts should have little difficulty dismissing actions for lack of proper venue. See *McKay* v. *Secretary of the Air Force,* 306 F. Supp. 1252 (D. Mass. 1969). Indeed the problems arising herein are venue, not jurisdictional problems. See pp. 26-27, 47-48, *infra.*

[6] In *Schlanger* respondents made pointed note of the fact that Sgt. Schlanger did not even claim Arizona as his permanent home of record (Brief of Resp. 31, n. 25).

identical to this one, in holding that there was habeas corpus jurisdiction in the district where the unattached reservist resides. Explicitly rejecting the reasoning of the decision below, Judge Hays analyzed the problem as follows:

> The practical circumstances of the serviceman on active duty and the unattached reservist are sufficiently different to warrant different results in deciding the question of jurisdiction. Usually a serviceman and his commanding officer are physically present within the same territorial jurisdiction. *Schlanger* involved an unusual situation of detached, temporary duty; *United States ex rel. Rudick* v. *Laird*, 412 F.2d 16 (2d Cir.), *cert. denied*, 396 U.S. 918 (1969) and *Feliciano* v. *Laird*, 426 F.2d 424 (2d Cir. 1970) involved servicemen on leave from or in transit to active duty stations. In those cases the servicemen were directly under orders of immediate commanding officers, and their physical separation from their commanding officers was temporary. The unattached reservist such as petitioner does not in fact have a direct commanding officer. The title of "commanding officer" given to the commander of the "centrally located, nationwide record keeping center" at Fort Benjamin Harrison is hardly more than a convenient fiction. See Hansen, *The Jurisdictional Bases of Federal Court Review of Denials of Administrative Discharges from the Military I*, 3 Sel. Serv. L. Rep. 4001, 4006 n. 60 (1971). Petitioner has never been in the same jurisdiction as his nominal "commanding officer." Petitioner's presence within the jurisdiction of the District Court for the Southern District of New York is neither temporary as in *Rudick*

and *Feliciano* nor sham for purposes of forum shopping. Since November, 1969 petitioner has worked and resided here. Whatever contact the commanding officer of the Center has had with petitioner has been in New York. The respondent had custody of petitioner in New York; petitioner initiated his application for discharge from New York and the required interviews were conducted here; all orders were sent to petitioner in New York. At no time was he required or requested to go to Fort Benjamin Harrison. Unlike the petitioners in *Schlanger, Rudick,* and *Feliciano,* the military has never required petitioner to be in the same jurisdiction as his "custodian." In those cases it was sensible to require that the petitions be filed in the jurisdictions where the petitioners normally resided, worked, were in custody, and were subject to orders. But where, as here, petitioner has never been within the same jurisdiction as his "commanding officer" and where for almost two years any contacts petitioner had with his commanding officer and the military have occurred within this jurisdiction, we believe that, if it is necessary to find that the nominal custodian is "present" in the jurisdiction, respondent's contacts with petitioner in New York are sufficient to be termed "presence."

It would be quite unreasonable and inequitable to read §2241(a) as requiring this petitioner to file for the writ in a distant jurisdiction in which he has never been and with which he has no real contacts at all. Such a requirement would entail needless expense and inconvenience. —— F.2d ——, ——, 4 SSLR 3692, 3693-94.

Properly limited, *Schlanger* is distinguishable from the situation presented here and is no bar to holding that the district court had jurisdiction to entertain this application.

B. *Habeas Corpus Jurisdiction Exists Even Within the Framework of* Schlanger v. Seamans.

In its brief in *Schlanger* v. *Seamans*, 401 U.S. 487, *supra*, the government conceded that habeas corpus jurisdiction would exist in districts where unattached reservists reside, as follows:

> "Such a situation would be presented by an occasional serviceman who, unlike petitioner here, is *stationed* at an isolated location in a district where there is no commanding officer; such a serviceman might well be allowed—in the exercise of the flexibility inherent in the statutory scheme—to file his habeas corpus petition in the district of his 'custody,' *i.e.*, where he is stationed, with extraterritorial jurisdiction over the person of his immediate commanding officer. Otherwise there would be no district in which a petition could be filed.
>
> Similar considerations led to the result in *Donigian* v. *Laird, supra*, involving a reserve officer, located in the district of Maryland, who had no custodian in any real sense other than the commander of the personnel center for reservists in Indiana. In this admittedly 'highly unusual situation' (308 F. Supp. at 453)—where there was no concurrence of custody and custodian in any district in the United States—the court allowed a petition to be filed in the district where the reserve officer was at the time actually attending graduate school, with the Army's permission, and where at least part of the military's processing of his discharge application had taken place. See n. 23, *supra*. We disagree, of course, with the *Donigian* court's reliance upon Section 1391(e), and with the similar lower court decisions in two other districts

upon which petitioner relies (Pet. Br. 17)." *Schlanger*, Brief of Resp. 33, n. 28.

The government's statement in *Schlanger* was not merely a concession made in debate; it expressed an accurate view of the law prior to *Schlanger*, reflecting traditional notions of habeas corpus jurisdiction.

1. Judicial History Behind *Schlanger*.

Until recent decisions of this Court expanded the usage and availability of the Great Writ, see p. 16, *supra*, cases invoking the territorial limits of habeas corpus jurisdiction were unusual, e.g., *Carbo* v. *United States*, 364 U.S. 611 (1961); *Ahrens* v. *Clark*, 335 U.S. 188 (1948); *Ex Parte Endo*, 323 U.S. 283 (1944). Moreover, in each of these cases it was the *absence from the district of the petitioner*, not the custodian, that was considered critical.

In *Carbo* the defect was held not fatal because of the distinction between the Great Writ and the writ of *habeas corpus ad prosequendum*. The Court noted, however, that the territorial limitations on jurisdiction to issue the Great Writ existed because "it was thought inconvenient, potentially embarrassing, certainly expensive and on the whole quite unnecessary to provide every judge anywhere with authority to issue the Great Writ on behalf of *applicants far distantly removed from the courts whereon they sat.*" *Carbo* v. *United States*, 364 U.S. at 617, *supra* [emphasis added].

In *Ahrens* the petitioners filed in a district where their custodian was located,[7] but where they were not physically

[7] The Court left undecided the question of whether the Attorney General, under whose order they were detained, was a proper respondent. 335 U.S. at 193.

present. The Court held that the petitioners' physical presence was a subject matter jurisdictional requirement. The Court observed that a contrary rule would result in administrative difficulties involved in transporting prisoners to districts other than those where they are located. 335 U.S. at 191. The Court pointedly noted that "[i]t is not sufficient . . . that the jailer or custodian alone be found in the jurisdiction." *Id.* at 190.

In *Endo,* the problem arose because the petitioner had been removed from the jurisdiction after the proceedings commenced, but the Court rejected rigid formulae as to the issuance of the Great Writ in order that its "objective may in no way be impaired" and held that jurisdiction was determined at the date of filing. 323 U.S. at 306-7.[8]

As late as 1970, in an opinion by Chief Justice Burger, this Court noted that new jurisdictional problems have arisen in the interim since Congress last amended §2241 and said that "[w]hether . . . the rigor of our *Ahrens* holding may be reconsidered is an issue upon which we reserve judgment." *Nelson* v. *George,* 399 U.S. 224, 228, n. 5 (1970).

Prior to *Schlanger* the lower federal courts, in dealing with these multi-state jurisdictional problems in both traditional prisoner and military cases, had concluded that *Ahrens* v. *Clark,* 335 U.S. 188, *supra,* now had to be read

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[8] The Court concluded that the removal of the petitioner was not fatal because a "respondent who ha[d] custody of the prisoner" could be found in the district. *Id.* at 307. This was a fiction, albeit a practical fiction. The petitioner was actually physically detained in a distant state, but the alleged custodian was deemed to be "any official of the War Relocation Authority . . . whose office is at San Francisco. . . ." *Id.* at 305. By analogy, Lt. Strait's service herein on the Commanding General of the Sixth Army (A. 31) should similarly satisfy this jurisdictional requirement. Gen. Larsen was clearly acting as an agent of the commanding officer at Ft. Benjamin Harrison. See pp. 34-35, *infra.*

as a venue decision in order to avoid potentially insoluble dilemmas. Among the venue criteria to be considered are the following: first, the physical presence of the petitioner, *Word* v. *North Carolina*, 406 F.2d 352, 355 (4th Cir. 1969); second, convenience to the parties, weighing both the necessity that habeas corpus be a convenient and swift remedy and the possibility of hardship to respondents, cf. *George* v. *Nelson*, 410 F.2d 1179 (9th Cir. 1969), *aff'd on other grounds*, 399 U.S. 224 (1970); *United States ex rel. Armstrong* v. *Wheeler*, 321 F. Supp. 471, 478 (E.D. Pa. 1970); *Donigian* v. *Laird*, 308 F. Supp. 449, 453 (D. Md. 1969); third, convenience of the forum with respect to trial of the issues, *United States ex rel. Meadows* v. *New York*, 426 F.2d 1176, 1183 (2d Cir. 1970); *Word* v. *North Carolina*, 406 F.2d at 356-7, *supra*; *Donigian* v. *Laird*, *supra*; and fourth, whether the custodian had sufficient contacts with the district to be amenable to service of process therein. *United States ex rel. Armstrong* v. *Wheeler*, *supra*; *Donigian* v. *Laird*, *supra*.

2. Clarification of *Schlanger* Is Appropriate.

Consequently, the Court's emphasis in *Schlanger* v. *Seamans* on the presence of a custodian in the district would appear to be inconsistent with the prior body of law, unless it is seen as a personal jurisdictional holding. If, consistent with its unique facts (*i.e.*, the active-duty serviceman who is voluntarily away from his assigned post), it is construed as a personal jurisdictional holding, then rules can be fashioned, consistent with Congressional intent and the noble purposes of the Great Writ itself, to avoid extremely harsh consequences in cases of unattached reservists. Such a rule would avoid unduly burdening the

courts in some locales, while at the same time preventing abuses in the nature of forum shopping. Such proposed rules, clarifying *Schlanger*, are herewith presented.

a. *The Presence of the Petitioner Creates a Presumption in Favor of Jurisdiction.*

28 U.S.C. §2241 vests district courts with jurisdiction over habeas corpus actions arising "within their respective jurisdictions." This Court has said this limits "the district courts to inquiries into the causes of restraints of liberty of those *confined or restrained within the territorial jurisdictions* of those courts." *Ahrens* v. *Clark*, 335 U.S. at 190, *supra* [emphasis added]. Where the petitioner and the respondents reside in different districts the first and obvious question to be asked is where is such a petitioner confined? Does the restraint exist only where the respondent resides, or does it exist where its effects are felt, *i.e.*, where the petitioner is located?

Rationality compels the latter answer. After all, it is the petitioner, not the respondent, who complains of the restraint. Hence in cases of confinement by remote control, the courts should presume, subject to rebuttal, that the confinement exists where the petitioner is located. In some cases the presumption may be readily overcome when petitioner's whereabouts are unknown to respondent, as for example, an escaped prisoner or a serviceman absent without authority. Then, of course, the restraints are not felt in the district.

In other cases, such as reservist cases, the courts may inquire into factors such as the length and permanency of the residence, whether or not the approval of the service

was obtained, and the availability of other forums.[9] In these cases the courts may look also to factors relating to the respondent's activities. Did the respondent's reach extend into the district? Did the administrative or judicial proceedings under review take place in the district? Are there agents of the respondent in the district who have established contact with the petitioner? These criteria are important because the effect of the writ is felt by its service on the custodian, and the court must have personal jurisdiction over the respondents. See discussion, *infra* at pp. 31-32.

After weighing such factors, a court may find that the restraint is really not at all related to the district despite petitioner's presence there. Or, as in the instant case, the substantial amount of contacts with the district on the part of both petitioner and respondents, and the absence of such contacts elsewhere, may enforce the presumption created by petitioner's presence and cause the court to logically conclude that the restraint arises within its jurisdiction.

Such a result will serve the policies behind the territorial limitations imposed by 28 U.S.C. §2241, as interpreted in *Schlanger*. First, since the petitioner is already present in the district it will be unnecessary for the respondents to engage in the costly, time-consuming efforts to transport the petitioner to the district where the proceedings are pending. See, *Ahrens* v. *Clark*, 335 U.S. at 191. (Note also the absence of escape problems in these cases.)

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[9] A serviceman on active duty who is on leave or in transit can always return to the site of the unit from where he departed and jurisdiction will immediately exist. See, *Feliciano* v. *Baird*, 426 F.2d 424 (2d Cir. 1970); *Laxer* v. *Cushman*, 300 F. Supp. 920 (D. Mass. 1969).

Second, other potential witnesses who participated in the prior administration or judicial proceedings will be at least as readily available in the forum district as elsewhere, and in many cases more readily available. And third, the court will not have difficulty ensuring that its ultimate decision is abided by, again because of the proximity to the petitioner. If the decision releases the petitioner from his restraints, an uncooperative respondent would have to enter the district in order to defy the court's order.

Lt. Strait believes that the above rule is consistent with the purpose of and result reached in *Schlanger* v. *Seamans*, 401 U.S. 487, *supra*, and would effect a salutary clarification of that case, as well as *Ahrens* v. *Clark*, 335 U.S. 188 (1948). The thrust of *Schlanger* clearly appears to go to personal jurisdiction, not subject matter jurisdiction. By not reaching the question presented by *Donigian* v. *Laird*, *supra*, the Court concentrated on the personal jurisdiction questions raised by the physical absence of the custodian, rather than subject matter questions. Other aspects of the opinion confirm that view; *e.g.*, the concern with the custodian's non-amenability to service of process including the footnote consideration of 28 U.S.C. §1391(e). 401 U.S. at 490-1, n. 4. Furthermore, no decision of this Court, including *Schlanger*, has ever held that both the petitioner and his custodian must be physically present in the same district in order for subject matter habeas corpus jurisdiction. Despite this, at least one court has put *Ahrens* v. *Clark*, 335 U.S. 188, *supra*, and *Schlanger* v. *Seamans*, *supra*, together and has reached that conclusion, thereby holding that no habeas corpus jurisdiction exists anywhere in this class of cases. See, *Still* v. *Commanding Officer*, —— F. Supp ——, 4 SSLR 3785 (N.D. Ala. 1971). See

also the dissenting opinion of Rutledge, J. in *Ahrens,* 335 U.S. at 196. Such a rule would of course create a serious conflict with other decisions that have expanded subject matter usage of the Great Writ.

b. *Under the Circumstances of This and Similar Cases, the Custodian May Be Found in the District for Jurisdictional Purposes.*

In the instant case the presence of the petitioner is not the only cause of the restraint in the Northern District of California, for Lt. Strait's nominal custodian was also jurisdictionally "present" in the district. The commanding officer of the Reserve Center directed orders to Lt. Strait in the district, and, when necessary, enlisted the aid of other Army officers in the district to carry out those orders. (AR 135-25, para. 7a.; see pp. 5-6, *supra.*) By these acts the commanding officer may be said to be "present" in the district, even though his body is not so present. As the Second Circuit said, "To give the commanding officer of the Center 'custody' of the thousands of reservists throughout the United States and to hold at the same time that the commanding officer is present for habeas corpus purposes only with one small geographic area is to ignore reality." *Arlen* v. *Laird,* —— F.2d ——, ——, 4 SSLR 3692, 3694 (2d Cir. 1971). Accord: *United States ex rel. Armstrong* v. *Wheeler,* 321 F. Supp. 471, 478, n. 11 (E.D. Pa. 1970); *Donigian* v. *Laird,* 308 F. Supp. 449, 453 (D. Md. 1969).

Nor is such a presence-through-contacts theory of jurisdiction a novel one—it has a long and well-established tradition in our jurisprudence, *McGee* v. *Int'l Life Ins. Co.,* 355 U.S. 220 (1957); *Int'l Shoe Co.* v. *Washington,* 326 U.S. 310

(1945); including its application to natural persons. *Calagaz* v. *Calhoun*, 309 F.2d 248, 255 (5th Cir. 1962). It is noteworthy in fact that in *McGee* v. *Int'l Life Ins. Co.*, *supra*, the contacts upon which jurisdiction attached were written communications. Here, of course, there are much more substantial contacts than mere writings through the many physical contacts that took place between Lt. Strait and subordinates of the Sixth Army Commanding General. It was on a similar basis that this Court found a custodian "present" in the Northern District of California in *Ex Parte Endo, supra,* even though the petitioner's actual "jailer" and ultimate custodian were elsewhere. Thus, although there was no concurrence of the "physical" presence of Lt. Strait and his nominal custodian, there was a concurrence of "jurisdictional presence."

Such an approach is not only realistic but may be required in cases of unattached reservists because it is difficult to determine which actual "person" is the "custodian." From this record it is entirely unclear as to who is Lt. Strait's immediate commanding officer, nominal or otherwise. It appears that no specific person is the "commanding officer" or "custodian" of reservists whose records are maintained at the Reserve Center. Rather the function is diffused among various staff officers depending on the nature of the function to be performed.[10] Consequently, to require the physical presence of the custodian would be unrealistic for this reason as well.

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[10] Although Col. Hoffman is the Commanding Officer of the Reserve Personnel Center, he did not perform the functions required of the individual's immediate commanding officer as described in AR 135-25. Paragraph 7.e.(1) states that the individual's immediate commander will submit certain information together with his recommendation and reasons therefor when the discharge application is submitted to the review board. In Lt.

c. *Having Found a Restraint Within the District, the Court's Process May Be Served Under One of Several Theories.*

1.) Use of 28 U.S.C. §1391(e).

In *Schlanger* this Court noted that "the legislative history [behind 28 U.S.C. §1391(e)] is barren of any indication that Congress extended habeas corpus jurisdiction." 401 U.S. at 490, n. 4.[11] Be that as it may, there is no reason why the service of process provisions contained therein may not be used to effect personal jurisdiction, once subject matter jurisdiction is found to exist. This was the holding of the Ninth Circuit recently in *Smith* v. *Campbell*, —— F.2d ——, 4 SSLR 3652 (9th Cir. 1971), a case reminiscent of *Ex Parte Endo, supra.* Indeed, had

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Strait's case, this function was performed by a Lt. Col. Raymond Vawter, who was the Chief of the Delayed Officer Management Division at the Reserve Center (A. 10, 41). (In *Still* v. *Commanding Officer*, —— F. Supp. ——, 4 SSLR 3785 (N.D. Ala. 1971), the court observed that the Army apparently considers this staff officer to be the immediate commanding officer of delayed active duty officers.) Surprisingly, the record reveals that Lt. Col. Vawter was also a permanent member of the Conscientious Objector Review Board at Ft. Benjamin Harrison (A. 40). It seems strange that the Commanding Officer of the Reserve Center would appoint this officer to a board on which he would be reviewing his own recommendations.

[11] The legislative history is equally barren of any indication that Congress did *not* intend to thus broaden the reach of the courts' personal jurisdiction in habeas corpus actions, especially those relating to federal administrative determinations. There is some authority that so holds. *Meck* v. *Commanding Officer*, 320 F. Supp. 1246 (E.D. Pa. 1970); *United States ex rel. Lohmeyer* v. *Laird*, 318 F. Supp. 94 (D. Md. 1970); *Silberberg* v. *Willis*, 306 F. Supp. 1013 (D. Mass. 1969), *reversed on other grounds*, 420 F.2d 662 (1st Cir. 1970).

Also the Court's reliance on *Harris* v. *Nelson*, 394 U.S. 286 (1969), appears to be misplaced. *Harris* involved the application of the judicially promulgated Federal Rules to habeas actions, not the application of a Congressionally created provision for service of process in civil actions.

§1391(e) existed when this Court decided *Endo,* it would undoubtedly have relied on it as well as, or rather than, personal service on an agent to effect the jurisdiction that had attached when the petition was filed.

In a variation, some courts have held that service pursuant to §1391(e) satisfies the notice requirements on a remote respondent who was found to be vicariously present in the district, thus effecting personal jurisdiction but not creating subject matter jurisdiction by virtue of that provision. *United States ex rel. Armstrong* v. *Wheeler,* 321 F. Supp. 471 (E.D. Pa. 1970); *Donigian* v. *Laird,* 308 F. Supp. 449 (D. Md. 1969). That was also the holding of the court of appeals below in its now vacated opinion (A. 64).

Lt. Strait suggests that this approach produces the most rational result, without engaging either in possible undue extension of §1391(e)'s purview, or needless fictions as to service on locally situated agents. By this process, together with actual service on the local United States Attorney, a petitioner unquestionably provides the appropriate respondent with notice of the action and with a real opportunity to be heard on the issues raised therein.

2.) Personal Service on the Personnel Center's Agent in the District.

Lt. Strait named and personally served the Commanding General of the Sixth United States Army at the Presidio of San Francisco, California, within the Northern District of California. The inclusion of Gen. Larsen was based on two theories. First, more than the remote, nominal; and somewhat fictional custodian(s) at Ft. Benjamin

Harrison, Gen. Larsen, as commander of the Army area where Lt. Strait lived, exercised physical control over him. All military activities requiring Lt. Strait's presence had been carried out at Army posts within Gen. Larsen's command and by subordinates of Gen. Larsen pursuant to his orders (A. 18). Moreover, should Lt. Strait have disobeyed an order issued from the Center in Indiana, he would have been detained by Army authorities where he was located (A. 34). The second theory behind service on Gen. Larsen is that he is the agent of Lt. Strait's nominal custodian in Indiana, and hence may be served on behalf of said individual. This was the basis of obtaining service over the custodian in *Ex Parte Endo,* 323 U.S. 283 (1944).

Although the Army will undoubtedly deny such a relationship because the "mysteries of Army bookkeeping" obscure such matters, *Feliciano* v. *Laird,* 426 F.2d 424, 427, n. 4 (2d Cir. 1970), its protestations defy reality. For example, Navy area commanders are apparently considered to have command of unattached reservists assigned to the Navy Reserve Personnel Center. See, *Brage* v. *Laird,* 4 SSLR 3516 (D. Minn. 1971); *United States ex rel. Ryan* v. *Broughton,* 4 SSLR 3498 (D. Minn. 1971).

Accordingly, if this Court's footnote in *Schlanger* is to be interpreted broadly to exclude any utilization of 28 U.S.C. §1391(e) in habeas corpus proceedings, then unlike in *Schlanger,* personal service of process in this case was duly made upon the Army's highest regional official found within the Northern District of California, who had acted theretofore as the agent of the commanding officer of Ft. Benjamin Harrison.

C. *A Result Contrary to That Urged by Lt. Strait May Lead to a Constitutionally Forbidden Temporary Suspension of the Writ of Habeas Corpus.*

If *Schlanger* is considered a "subject matter" decision, rather than a "personal" jurisdiction decision, and if the commander of the Reserve Center cannot be found in the district vicariously, then in combination with *Ahrens* v. *Clark,* 335 U.S. 188 (1948), suspension of the writ of habeas corpus, albeit temporary in nature, will have occurred. The Constitution of the United States, Article I, Section 9, provides that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." This clause has not been frequently interpreted, but the cases do indicate that any rule which restricts or delays the availability of the Great Writ is suspect.

Consideration of this clause must start with the premise that the Writ is "one of the basic safeguards of personal liberty . . .," *Hirota* v. *McArthur,* 338 U.S. 197, 201 (1948) [Douglas, J., concurring], and that, as such, one of its greatest characteristics is that it "afford[s] a swift and imperative remedy . . .," *Secretary of State for Home Affairs* v. *O'Brien,* (1923) A.C. 603, 609, quoted in *Developments—Federal Habeas Corpus,* 83 Harv. L. Rev. 1038, 1040 (1970). This function of the Great Writ was discussed and endorsed by this Court in *Price* v. *Johnston,* 334 U.S. 266 (1948), as follows:

> "The writ of habeas corpus has played a great role in the history of human freedom. It has been the judicial method of lifting undue restraints upon personal liberty. * * * The most important result of such usage has been to afford a swift and imperative rem-

edy in all cases of illegal restraint upon personal liberty." 334 U.S. at 269.

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"Moreover, the principle has developed that the writ of habeas corpus should be left sufficiently elastic so that a court may, in the exercise of its proper jurisdiction, deal effectively with any and all forms of illegal restraint. The rigidity which is appropriate to ordinary jurisdictional doctrines has not been applied to this writ. * * * Only in that way can we give substance in this case to our previous statement that 'dry formalism should not sterilize procedural resources which Congress has made available to the federal courts.'" *Id.* at 284. See also, *Harris* v. *Nelson,* 394 U.S. 286, 291 (1969) ["... a prompt and efficacious remedy ..."], quoting *Fay* v. *Noia,* 372 U.S. 391, 401 (1963).

Discussing this language in *Price,* the district court in *St. Clair* v. *Hiatt,* 83 F. Supp. 585, 586 (N.D. Ga. 1949), *aff'd,* 177 F.2d 374 (5th Cir. 1949), further said:

"Any statute which might tend to weaken its efficiency or delay its availability or makes its use more difficult should be carefully considered and construed liberally in the light of its history and its benign purposes."

Similarly in *Hirota* v. *McArthur, supra,* Mr. Justice Douglas said:

"There is no room for niggardly restrictions when questions relating to its availability are raised. The statutes governing its use must be generously con-

strued if the great office of the writ is not to be impaired." 338 U.S. at 201.

It may be argued that the writ has not been suspended as regards Lt. Strait because a) he might have been able to file in Indiana, or b) he could have waited until he reported for active duty in Georgia to have a forum. Certainly these alternatives are not sufficiently available and adequate to serve the great purposes described above. To require such cumbersome procedures hardly connotes the kind of flexibility and elasticity attributed to the writ. Rather it sounds of the "rigidity which is appropriate to ordinary jurisdiction doctrines. . . ." *Price* v. *Johnston*, 334 U.S. 266, 284, *supra*. Indeed, Congress has never attempted to define precisely the territorial limitations of habeas corpus jurisdiction, but has been content for nearly a century with the intentionally ambiguous language now found in 28 U.S.C. §2241 in order to give the courts the kind of flexibility required when dealing with the Great Writ.

Such flexibility is demanded here. A military reservist wants to be heard before, not after, the restraint of active duty is felt, *Scaggs* v. *Larsen*, 396 U.S. 1206 (1969) [Douglas, J. in chambers]; *Arlen* v. *Laird*, —— F.2d —— (2d Cir. 1971); *Berman* v. *Resor*, 302 F. Supp. 1200, 1202 (N.D. Cal. 1969), especially a conscientious objector who is no longer protected by the provisions of D.O.D. Dir. 1300.6 regarding his duty assignments. He does not wish to "gamble with his liberty," *Pedreiro* v. *Shaughnessy*, 213 F.2d 768, 769 (2d Cir. 1954), *aff'd*, 349 U.S. 48. (1955), for the cloak of military status once assumed, is not easily shed.

II.

Policy considerations support the interpretation of the habeas corpus statute urged by the petitioner and the conclusion that the District Court had jurisdiction.

When courts review denials of requests for military discharge, they ordinarily face questions of law, presented on undisputed and brief administrative records, wherein they must determine whether the procedures followed were correct and, if so, whether there was a "basis in fact" for the action taken. The instant case is typical. Lt. Strait raised legal issues relating both to procedural deficiencies and the absence of a "basis in fact" for the denial of his conscientious objector discharge. Moreover, Lt. Strait, because he received notice of the adverse administrative decision on the eve of reporting for active duty, required prompt judicial action, which, in fact, he obtained, as is customary in these cases. E.g., *Hammond* v. *Lenfest*, 398 F.2d 705 (2d Cir. 1968); *Donigian* v. *Laird*, 308 F. Supp. 449 (D. Md. 1969); *Silberberg* v. *Willis*, 306 F. Supp. 1013 (D. Mass. 1969), *reversed on other grounds*, 420 F.2d 662 (1st Cir. 1970).

Respondents have urged, however, that in order for the courts properly to review this case, the petitioner should have traveled to a distant state and, perhaps should have assumed the very military status which his beliefs of conscience forbade and which he contended was being illegally demanded of him. Accordingly, three alternatives for bringing such actions are suggested: (1) in the district of the reservist's residence as proposed by Lt. Strait; and (2) in the district where the Reserve Center is located, or (3) where the reservist is required to report to active duty.

Certainly the last two alternatives present ineffective and vexatious ways for the federal judiciary to adjudicate such claims. In the last quarter century, Congress has repeatedly expressed its concern for the problems of citizens seeking judicial redress from adverse administrative actions of the geographically diversified agencies of the federal government. It has repeatedly permitted such actions to be brought at the place of the aggrieved citizen's residence, rather than at the seat of the government. Lt. Strait, and others similarly situated, should not become a class judicially excluded from this Congressional design. There are no persuasive reasons why he should be forced "to leave his home and his work in order to contest the power of the Army to force him to do so." *Arlen* v. *Laird*, —— F.2d ——, ——, 4 SSLR 3692, 3694 (2d Cir. 1971). As Judge Harold Medina said in a related context:

> "Under these circumstances it would seem that the courts must be able to spell out some simple formula, which will cut through red tape, face realities, and provide an expeditious and inexpensive remedy, with a minimum amount of procedural frills and a maximum amount of attention to the question of whether or not the administrative proceedings . . . have conformed to the requirements of due process." *Pedreiro* v. *Shaughnessy*, 213 F.2d at 769, *supra*.

The formula suggested by the petitioner minimizes hardship to this class of reservists without inconveniencing the government in any significant way. The result urged by the respondents maximizes the hardship to reservists without advancing any reasonable policy objective.

A. *The Decision Below Will Cause Severe Hardship to Military Reservists Like the Petitioner.*

Respondents seriously understate the problems encountered by persons who must do judicial battle with the military in districts hundreds or thousands of miles from their homes (Resp. to Pet. 5). They offer such reservists two alternatives: travel to the district where the Command Center is located and litigate there or report for active duty and file suit in that district. Either alternative imposes needless hardship.

1. Active Duty Alternative.

The jurisdictional alternative suggested most seriously by respondents in this case is that Lt. Strait travel to Georgia (at government expense), report for active duty, and then file his petition (*Id.* at 7, n. 3). This proposal involves several serious problems, the least of which is financial.

a. *The Conscientious Objector on Active Military Duty.*

The first and most onerous hardship is the two-fold burden of assuming the very military status which is contested. The conscientious objector must not only live with his own attitudes about military status, but also, live with the hostile feelings of the military toward him, as Mr. Justice Douglas observed in his dissenting opinion in *Ehlert* v. *United States,* 402 U.S. 99, 109-13 (1971). Further, the *Ehlert* majority's notation, 402 U.S. at 106, n. 9, that inductees seeking conscientious objector discharge must be assigned to non-combatant duties, does not apply here.[12]

[12] Unlike persons whose applications are still pending before the military, Lt Strait and others who have received final adverse decisions are not protected by regulation against being ordered to

Thus, upon his reporting for active duty there would be nothing to prevent the Army from assigning Lt. Strait to repugnant duties pending the outcome of his court action. Furthermore, if Lt. Strait found he could not perform his assigned duties in good conscience, he could become enmeshed in court-martial proceedings while his civilian court action was indefinitely stayed. *Parisi* v. *Davidson*, 435 F.2d 299 (9th Cir. 1971), *cert. granted*, 402 U.S. 942 (1971).[13] One can hardly blame Lt. Strait "for unwillingness to gamble with his liberty which may not readily be regained." *Pedreiro* v. *Shaughnessy*, 213 F.2d at 769, *supra*.

b. *Problems of a Strange Community and Cost.*

Even assuming that his military life goes smoothly, many substantial hardships and problems can be encountered by a petitioner suddenly thrust into an alien environment thousands of miles from his community, home, friends, and informed counsel who represented him at the administrative level. Finding competent professional assistance in a strange community on short notice is difficult

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violate their beliefs pending judicial review. D.O.D. Dir. 1300.6 (Aug. 20, 1971), para. VII.C. provides as follows:

> "Persons who are assigned to non-combatant duties, and persons who are assigned to normal military duties by reason of disapproval of their application, will be expected to conform to the normal requirements of military service and to perform satisfactorily such duties to which they are assigned. Violations of the Uniform Code of Military Justice by these members will be treated as in any other situation."

[13] Conscientious objectors are in fact poorly assimilated into the military, Sherman, *Judicial Review of Military Determinations*, 55 Va. L. Rev. 483, 522 (1969), and they frequently become involved in disciplinary proceedings. E.g., *Parisi* v. *Davidson*, *supra*; *Bratcher* v. *McNamara*, 448 F.2d 222 (9th Cir. 1971); *Craycroft* v. *Ferrall*, 408 F.2d 587 (9th Cir. 1969), *vacated and remanded*, 397 U.S. 335 (1970).

enough for the ordinary person; the problems are multiplied for one who desires immediately to commence a hazardous judicial proceeding while on active duty in the Army.[14] These handicaps are unduly burdensome both as to cost and delay in obtaining judicial review; to some, they could become an insurmountable barrier.

c. *Delays Involved in Post-Activation Suits.*

Finally, even if petitioner is able to overcome these burdens, the post-activation remedy is not suitable due to the delays involved. First, the reservist wants a judicial ruling on whether or not he has to go on active duty before, not after, he has done so. See *Arlen* v. *Laird, supra.* If a reservist must accordingly wait months, weeks, or even days, to file his petition, the Great Writ has lost the element of swiftness traditionally associated with it. Second, there is no way to predict what developments a particular case will take, and much time can elapse before the activated reservist is released from his restraint. See, e.g., *United States ex rel. Greenwood* v. *Resor, supra* (where the petitioner was apparently on active duty for about a year before the Court of Appeals ordered his discharge).

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[14] In *United States ex rel. Greenwood* v. *Resor,* 439 F.2d 1249, 1252, n. 5 (4th Cir. 1971), the court enumerated some of the legal difficulties that can be encountered in these cases. Moreover, in the past there was considerable judicial resistance to grant relief in conscientious objector discharge cases. Indeed, D.O.D. Directive 1300.6 had been in effect six years before the first court-ordered discharge was reported. Hansen, *Judicial Review of In-Service Conscientious Objector Claims,* 17 UCLA L. Rev. 975, 976 (1970). Some of this resistance still exists. See, e.g., *Lawson* v. *Laird,* 443 F.2d 617 (5th Cir. 1971) (where the Court of Appeals was required to direct a district court to hear and consider habeas corpus applications that even the government, on appeal, conceded stated *prima facie* grounds for relief).

2. The Pre-Activation Reserve Center Alternative.

All but one of the difficulties discussed above would apply if Lt. Strait were to file his petition in the district where the Reserve Personnel Center is located. The exception, of course, is the hardships involved in actually being on active duty.

But all of the other cumbersome and costly problems associated with litigating in a strange and distant forum would be present in the district where the Reserve Center is located.[15] Moreover, if the court denied interlocutory relief, the Reserve Center forum would be the least desirable of the three alternatives. A situation would then exist where Lt. Strait would be in Georgia, his primary counsel in California and the case pending in Indiana (or Missouri).

In addition, much of the swiftness associated with habeas corpus is also lost when a petitioner and his counsel must occupy hours or days of their time travelling across country to the court. In many of these cases a day or less can make the difference in obtaining a meaningful remedy which often involves the necessity of interlocutory relief. This case is typical in this regard.

Lt. Strait's request for discharge was denied April 7, 1970, and he was notified of that fact by a letter dated the same day, and by which he was also informed that he would be expected to comply with orders to report for active duty on April 13, 1970. He thereupon filed this action in the district court and obtained a restraining order on April 10, 1970.

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[15] Indeed, the cost factor might be greater since the Army would not pay Lt. Strait's own travel costs in getting there if that became necessary.

The case was then heard, and an order denying the petition was entered July 28, 1970. Counsel immediately obtained a stay of that ruling on July 31, 1970, in order to seek reconsideration in the district court or an injunction pending appeal. Both motions were denied on August 4, 1970, but the restraining order was extended 10 days to permit an application for stay to the Ninth Circuit.

The Army then re-ordered Lt. Strait to report for active duty on August 17, 1970, and Lt. Strait filed an application for a stay of those orders with the court of appeals, but the court declined to enjoin his activation in an order entered on August 14, 1970, a Friday, at 4:45 P.M. Lt. Strait then presented an application to Mr. Justice Douglas at Goose Prairie, Washington, on August 16, 1970, which the Justice granted.

Finally, there is still uncertainty about the jurisdiction of a district court where the petitioner is not present and has never been physically located. This Court has still not resolved the habeas corpus subject matter jurisdictional question that arises when the petitioner is not physically present in the district where his custodian is located. *Nelson* v. *George,* 399 U.S. 224, 228, n. 5 (1970); *Ahrens* v. *Clark,* 335 U.S. 188 (1948).[16] At least one district court has concluded that *no district* in the United States has habeas corpus jurisdiction over non-unit reservists who re-

[16] The *Ahrens* court was concerned not with the absence of a custodian but the absence of the petitioner from the district. See pp. 25-26 *supra.* Lt. Strait has not had any physical contact with Indiana; hence, it is not certain he could file a petition there. Moreover, the *Ahrens* majority held that the lack of jurisdiction caused by the petitioner's absence was not waivable by respondents, 335 U.S. at 193; hence, any offer made herein by the Army not to raise jurisdictional objections in the district where the Reserve Center is located is illusory.

side outside the district of their service's record center. *Still* v. *Commanding Officer*, —— F. Supp. ——, 4 SSLR 3785 (N.D. Ala. No. 71-616, 11-19-71). The only way Lt. Strait could be at all certain that jurisdiction would exist would be to move to that district and assume a domicile there, a possibility the court in *Still* properly characterized as "bizarre."

Thus, it can be seen that neither alternative suggested is wholly acceptable or adequate to non-unit reservists.[17]

B. *The Result Urged by the Petitioner Will Cause No Hardship to Military Services.*

None of the problems enumerated above would be offset by benefits to the services. In *Schlanger* the government urged a literal reading of the jurisdictional provisions of 28 U.S.C. §2241 in order 1) to prevent "forum shopping" and 2) to avoid excessive disruption of the military, both of which it suggested would flow from a more flexible rule (Brief of Respondents 13). To whatever extent their arguments may have had validity in the unique factual setting of the *Schlanger* case, they have no application whatsoever in the context of this case and others involving non-unit, delayed active duty reservists.

1. Forum Shopping Can Be Prevented.

There has never been, nor can there be, any suggestion in this case that Lt. Strait was shopping for a forum. Never-

[17] The reserve center alternative also would result in cases being concentrated in the three districts where Reserve Centers are located. Congress has repeatedly enacted corrective legislation to avoid this result in habeas corpus cases, see 28 U.S.C. §§2241(d) and 2255, as well as in other areas of the law, see 28 U.S.C. §1361. Requiring reservists like the petitioner to litigate in these three districts would frustrate those legislative purposes.

theless, the issue of "forum shopping" so pervades questions of federal court jurisdiction that it cannot be completely ignored. The possibility of "forum shopping" arises whenever jurisdiction over a particular cause of action lies in more than one district. Congress has adequately equipped the lower courts with the tools needed to resolve the problems posed. While there may be some novelty to considering this proposition in the habeas corpus context, the lower federal courts have come to recognize it as inevitable in light of the evolving concept of custody. See *United States ex rel. Meadows* v. *New York, supra; Word* v. *North Carolina, supra.* Accordingly when faced with venue problems posed by new classes of petitioners, they have applied traditional venue concepts to deal with those issues. See, e.g., *United States ex rel. Meadows* v. *New York, supra* at pp. 1180-83.[18]

Even if venue criteria are met, the district court still has discretion to prevent "forum shopping" under 28 U.S.C. Section 1404(a) whereby the court may transfer any civil action to a more convenient forum. Of course no transfer motion was made below, before or after the district court held that it had jurisdiction.[19] Indeed, the respondents pre-

[18] In the context of this case, the parties must meet certain specific venue criteria set forth in 28 U.S.C. Section 1391: either, one of the parties must reside in the district, 28 U.S.C. Section 1391(e)(1) and (4), or the cause of action must have arisen there, 1391(e)(2). Thus, even when the serviceman is physically present in the district, the court may find he does not "reside" there by considering such factors as length and permanency of residence, extent of contacts with the district, and maintenance of another domicile, J. W. Moore, *Federal Practice,* para. 0.142 [5.-2], p. 1483-4, n. 5 (2d Ed. 1964). See, e.g., *McKay* v. *Secretary of the Air Force,* 306 F. Supp. 1252 (D. Mass. 1969) (a *venue, not a jurisdictional,* holding).

[19] Such a motion would probably have been denied on the merits because petitioner had substantial contacts with the district, most

sented their case effectively and without difficulty, as is usual.

"Forum shopping" should therefore properly be dealt with through the venue and transfer statutes provided for that purpose, rather than through inflexible and artificial jurisdictional decisions which unnecessarily defeat Congressionally intended ease of remedy. And the venue considerations should be the same whether the action is brought as a habeas corpus application, see Point I, *supra*, or pursuant to mandamus or other jurisdictional bases, see Points III to V, *infra*.

2. No Interference With Military Operations Will Result.

The suggestion that a flexible jurisdictional rule would result in undue interference with military operations—a dubious proposition in the first place—has no application to non-unit reservists. An unattached reservist, such as Lt. Strait, is only nominally part of the military. Until he reports for active duty he is performing no function as part of the service; unlike a unit-assigned reservist, he is not even part of a "paper" organization. Moreover, upon reporting for active duty he will have to undergo training before he is even useful to the service.

Hence any delay of active service in such cases can cause only minimal disruption, if any at all, with ongoing military operations. In many cases delays will be non-existent

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of the relevant administrative proceedings took place there, and respondents had been content previously to communicate by mail with the petitioner at his home in the district. Furthermore, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil* v. *Gilbert*, 330 U.S. 501, 508 (1947).

or extremely brief. Some cases will be so devoid of merit as either not to warrant interlocutory relief, and/or to be amenable to summary disposition. Most cases will involve only questions of law, and the expeditious habeas corpus procedures should enable courts to dispose of them quickly. Only in cases of great merit or considerable complexity will there be longer delays, but that hardly seems to be unwarranted.

In fact many, if not most, of the delays complained of are self-inflicted by the military services in their zeal to raise jurisdictional defenses whenever possible,[20] often resulting in bifurcated trials and separate appeals, as here. If the services have an honest quarrel with the forum, they should move for transfer under 28 U.S.C. §1404. Failing that it would then seem to be in their interest to waive personal jurisdiction objections in order to obtain an expeditious ruling on the merits.

This case is a perfect example of such self-inflicted delay. Lt. Strait filed his petition on April 10 and from then until June 26 the court was diverted to a consideration of the respondents' jurisdictional objection. Once respondents answered on the merits on July 22, the court quickly disposed of the merits with a ruling filed on July 28 (A. 2). As the Second Circuit perceptively observed in *Arlen* v. *Laird, supra,* the government has demonstrated its lack of genuine interest in having these cases tried in any par-

[20] The history of in-service discharge cases has been one of extensive litigation over jurisdictional issues. See, Hansen, *Jurisdictional Bases of Federal Court Review of Denials of Administrative Discharges from the Military I,* 3 SSLR 4001, 4002 (1971).

ticular forum; in reality its only interest appears to be to cause maximum inconvenience for petitioners.

Finally, the government often magnifies the problems of restraining orders or orders requiring the subsequent return of petitioners to court, and underestimates the sensitivity of the courts to military exigencies. Few cases require the actual presence of petitioner, for they are tried on the administrative record. See, *Silberberg* v. *Willis*, 420 F.2d 662, 665 (1st Cir. 1970). Specifically, 28 U.S.C. §2243 waives that requirement where, as here, only issues of law are involved. Furthermore, as the Ninth Circuit recently noted, the district courts may be less inclined to grant interlocutory stays of deployment if they can be certain that the subsequent removal of the petitioner from the district will not cause them to lose jurisdiction. *Smith* v. *Campbell*, —— F.2d ——, —— 4 SSLR 3652, 3654 (9th Cir. 1971).

The necessity of interlocutory relief must first be determined by the district court after weighing such factors as the merits of the claim and the harm to be suffered by the granting or denying of interlocutory relief. If the court finds the claim insubstantial and/or the loss of the individual's services critical to the military, it may well deny temporary relief, but if the reverse is true, an order maintaining the *status quo ante* is equally appropriate. If the court ultimately rules that the individual should have been discharged, the military can hardly complain of having been deprived of his services *pendente lite*. Moreover, the services may ultimately lose more by requiring reservists to report for active duty *pendente lite*, since they will have to pay to the individual his travel, salary, and living expenses and bear the cost of training him, all of which will be lost if he is ordered discharged by the courts. This in

effect defeats the purposes of the services' own regulations which, recognizing the validity of claims of conscientious objectors, permit their separation from the military.[21]

C. *Conclusion.*

The ultimate question is whether the services' concerns are best dealt with by creating a jurisdictional rule that is inflexible and highly artificial, or whether these matters should be left to the wise discretion of the lower courts to be resolved traditionally as matters involving venue, *forum non conveniens,* and injunctive relief. The petitioner submits that the latter approach is not only preferable, but is mandated by Congressional policy.

III.

Mandamus jurisdiction is available to review the military's denial of conscientious objector discharge applications.

Lt. Strait also pleaded jurisdiction pursuant to 28 U.S.C. §§1361 and 1391(e), both for the purpose of reviewing the ultimate decision on the merits (which he alleged was contrary to the regulatory criteria and without basis in fact)

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[21] Curiously, the military will suffer more disruption in the cases of servicemen, whether active or reserve, who, under the government's theory, are permitted to bring court actions in the district where they reside merely because their departing unit is also located there. See e.g., *Feliciano* v. *Laird,* 426 F.2d 424 (2d Cir. 1970); *Carney* v. *Laird,* 326 F. Supp. 741 (D. R.I. 1971); *Laxer* v. *Cushman,* 300 F. Supp. 920 (D. Mass. 1969); and *Silberberg* v. *Willis,* 306 F. Supp. 1013 (D. Mass. 1969), *reversed on other grounds,* 420 F.2d 662 (1st Cir. 1970). Nevertheless, respondents appear to accept a jurisdictional rule that permits this amount of disruption, but to oppose an interpretation that will permit some non-unit reservists to enjoy the same standing (Resp. to Pet. for Cert. 5, nn. 1 & 2), with less apparent disruption.

and for the purpose of reviewing his allegations that his application was processed in a manner contrary to regulations. The court of appeals implicitly rejected the first basis of jurisdiction, apparently in reliance on *Jarrett* v. *Resor*, 426 F.2d 213 (9th Cir. 1970). It conceded that limited mandamus jurisdiction existed to review the procedural irregularities,[22] *Feliciano* v. *Laird*, 426 F.2d 424 (2d Cir. 1970); *Schatten* v. *United States*, 419 F.2d 187 (6th Cir. 1969), but it held that the exercise of that jurisdiction was not appropriate in this case (A. 64). The court of appeals fashioned novel rules of law regarding mandamus jurisdiction under 28 U.S.C. §1361 that have no support in authority and which severely undermine the intent of Congress. See generally, 3 K. DAVIS, *Administrative Law Treatise*, §§23.09-.12, pp. 334-362 (1958). Furthermore, even its application of its own newly adopted rules was incorrect in the case at hand.

A. *The Ninth Circuit's View of the Scope of Review Under §1361 Is Erroneous.*

The court of appeals stated, without amplification, that the district court could not have granted complete relief to Lt. Strait pursuant to its mandamus jurisdiction (A. 73). This assumption apparently derives from the Ninth Circuit's earlier ruling in *Jarrett* v. *Resor*, 426 F.2d 213, *supra*, that 28 U.S.C. §1361 is not available to test on the merits a denial by the military of a request for conscientious objector discharge. The Ninth Circuit's view of the scope of mandamus jurisdiction rests on a dubious reading of Con-

[22] In its February 17 opinion, the Court of Appeals apparently agreed that there had been procedural irregularities (A. 66), but found it unnecessary to reach those issues because of the conclusion that on the existing record the ultimate decision of the Army was without a "basis in fact."

gressional policy and is in conflict with decisions in other circuits. See, e.g., *Bluth* v. *Laird*, 435 F.2d 1065 (4th Cir. 1970); *Peoples* v. *U. S. Dept. of Agriculture*, 427 F.2d 561 (D.C. Cir. 1970); *United States ex rel. Schonbrun* v. *Commanding Officer*, 403 F.2d 371 (2d Cir. 1968); *Ashe* v. *McNamara*, 355 F.2d 277 (1st Cir. 1965); *Still* v. *Commanding Officer*, —— F. Supp. ——, 4 SSLR 3785 (N.D. Ala. 1971); *United States ex rel. Clements* v. *Laird*, 3 SSLR 3863 (D. Md. 1971); *United States ex rel. Olsen* v. *Laird*, 3 SSLR 3774 (M.D. N.C. 1970).

In the Mandamus and Venue Act of 1962, 28 U.S.C. §§1361 and 1391(e), Congress greatly expanded the power of the federal district courts to review claims by individuals that officials or agencies of the government had violated their legal rights by failing to act in accordance with prescribed law. Some commentators have argued that Congress intended to expand the scope of judicial review of federal agency actions. *E.g.*, Byse and Fiocca, *"Section 1361 of the Mandamus and Venue Act of 1962 and 'Nonstatutory' Judicial Review of Federal Administrative Action,"* 81 HARV. L. REV. 308 (1967). Likewise in *Peoples* v. *U. S. Dept. of Agriculture*, the District of Columbia Circuit said:

> "This statute fills a void, which previously had been taken to prevent District Courts outside the District of Columbia from issuing mandamus against a government official. While the statute is couched in terms of mandamus action, its liberalizing purpose, to remove technical objection that exists outside the District of Columbia, was intended to permit District Courts generally to issue appropriate corrective orders where Federal officials are not acting within the

zone of their permissible discretion but are abusing or otherwise acting contrary to law. . . ." 427 F.2d at 565.

There can be no question that Congress intended to make it easier and more convenient for citizens to challenge alleged illegal government actions in the courts, as well as to ease the burden on certain districts where certain classes of cases could exclusively be maintained theretofore. Senate Report No. 1992, accompanying H.R. 1960, 1962 U.S. Code Cong. and Adm. News 2785. Nor can there be any question that the result below defeats both purposes of Congress, since it makes it harder for a citizen like Lt. Strait to sue the Army by requiring him to initiate action in a distant state, while at the same time concentrating these cases in the three districts where military administrative centers are located.

Although Congress intended that §1361 would not permit the district courts to interfere with decisions ordinarily entrusted to agency discretion, Senate Report 1992, *supra* at 2787, we do not have such a decision here. It is well settled that "discretionary" actions comprise a narrow and exceptional category of agency decision. *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 410 (1971), which are "political in nature," *Marbury* v. *Madison,* 1 Cranch (5 U.S.) 137, 170 (1803), and in which there is no law limiting the decision-maker's choices, L. JAFFE, *Judicial Control of Administrative Action* 181 (1965),[28] so that

[28] In *Ramos* v. *County of Madera,* 4 Cal. 3rd 685, 693, 484 P.2d 93, 98-9 (1971), the California Supreme Court adopted a useful definition of "discretionary" actions, as follows:

"Discretionary activity . . . is that related to basic policy decisions, or that activity sometimes characterized as the

the courts cannot determine whether the action under review was legally taken.

Although the Secretary of Defense may have had discretion in deciding whether or not to recognize claims of in-service conscientious objectors, he exercised that discretion when he promulgated D.O.D. Dir. 1300.6 which provides that conscientious objectors shall be discharged if they meet certain criteria.[24] The services thus no longer have discretion, as a matter of policy, to grant or deny such requests for discharge; the choices are limited by the regulatory criteria and the body of decisional law interpreting those criteria. Hence the services are limited to determining whether the criteria have been met and, if they have, to grant the relief decreed by regulation.

The Ninth Circuit succinctly summarized this concept in *Ferry* v. *Udall,* 336 F.2d 706, 713 (9th Cir. 1964), as follows:

> "The discretion of the Secretary is limited to deciding whether these requirements have been met. Judicial review . . . is available, since it would be anomalous to allow [an applicant] to lose rights, the conferring of which is made mandatory by the applicable statute, merely because . . . the Department . . . made erroneous or arbitrary decisions. . . ."

'planning' as opposed to the 'operational' level of decision-making."

Similarly see, *Gonzalez* v. *Freeman,* 334 F.2d 570, 575 (D.C. Cir. 1964) [Burger, Circuit Judge].

[24] D.O.D. Dir. 1300.6, para. IV A provides that discharges shall be granted to the extent practical. This portion of the directive does vest the services with discretion, but it has never been relied upon as grounds for denying a discharge, see *Hammond* v. *Lenfest,* 398 F.2d 705, 715-6, *supra; Crane* v. *Hedrick,* 284 F. Supp. 250, 254-5 (N.D. Cal. 1968), nor was there such a finding in this case.

This formula is, of course, a reiteration of the basic formula for mandamus expressed nearly a half century ago by Chief Justice Taft in *Work* v. *United States ex rel. Rives*, 267 U.S. 175, 177-8 (1925). See also, *Roberts* v. *United States*, 176 U.S. 221 (1900). Once Congress by statute, or the agency by rule, establishes rules to be followed, any agency action thereunder is reviewable by mandamus if it has clearly failed to follow the established criteria. *McKay* v. *Wahlenmaier*, 226 F.2d 35, 47 (D.C. Cir. 1955); *Carey* v. *Local Board No. 2*, 297 F. Supp. 252 (D. Conn.), *aff'd*, 412 F.2d 71 (2d Cir. 1969).

The failure of an agency to correctly apply the statutory or regulatory criteria as an object of mandamus relief has been eloquently urged by Prof. Jaffe, as follows:

> "Before a court can decide that an official 'has discretion' whether or not or how to act, it must decide what relevant discretion has been granted. This decision will rest on an interpretation or construction of the statute conferring the power. Under our constitutions and our common law the courts have the power to determine the legality of administrative action. This is the power to decide the rule of law which defines the granted area of discretion.
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> • • • • •
>
> "In short the officer may have discretion, not only to find the facts, but to choose the law. This means that he may make a choice which the court might not itself have made as an original proposition. But if a court is convinced that the rule chosen by the officer is clearly contrary (in its opinion) to the statutory purpose, then it will order the officer to act according to its view of

> the law; it will not and should not desist merely because in a general sense the officer has discretion. He has exercised his discretion contrary to law and in this sense he has violated a clear duty." JAFFE, *supra* at 181-2 and 183-4.

Therefore mandamus is available to review in-service denials of requests for discharge, especially if the courts are going to insist on applying the "basis in fact" test in such cases. When the agency decision is tested under the basis in fact standard of review the possible infringement upon agency discretion becomes nil. *Still* v. *Commanding Officer,* —— F. Supp. ——, 4 SSLR 3785 (N.D. Ala. 1971). In other words, if there is "no basis in fact" for the denial of the claim, then it can be said that the agency failed to perform a clear duty that it owed to Lt. Strait, *i.e.,* to base its decision on legal criteria and to act lawfully itself. Cf., *Estep* v. *United States,* 327 U.S. 114 (1946);[25] see also, JAFFE, *supra* at 366-7 and 374; and Van Alstyne, *Governmental Tort Liability: A Decade of Change,* 1966 U. ILL. L.F. 919, 975. In this regard, the courts will be doing what they traditionally do when they review agency actions pursuant to their mandamus jurisdiction—determining whether or not the agency followed the law.

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[25] In *Estep,* the Court ruled that a draft board which denies a requested classification in the absence of any "basis in fact" acts "lawless[ly] and beyond its jurisdiction." 327 U.S. at 121. The same rule would apply against respondents here, as the standards in conscientious objector cases are the same as between the Selective Service System and the military. *Gillette* v. *United States,* 401 U.S. 437 (1971).

B. *The Court of Appeals Improperly Confused Judicial Mandamus With Administrative Mandamus.*

The court below held that "[m]andamus is an extraordinary remedy which is to be utilized only in the most urgent cases," paraphrasing *Ex Parte Collett*, 337 U.S. 55, 72 (1949). The precise language in the cited case is as follows: "Mandamus prohibition and injunction *against judges* are drastic and extraordinary remedies. . . ." [Emphasis added.] *Cmax Inc.* v. *Hall*, 300 F.2d 265 (9th Cir. 1962), and *Pacific Car and Foundry Co.* v. *Pence*, 403 F.2d 949 (9th Cir. 1968), also cited by the court, are likewise cases involving mandamus against judges. Careful analysis of the cases cited by the court of appeals reveals that there is a critical distinction between judicial mandamus and administrative mandamus. Only mandamus against judges truly lies within the "sound discretion" of the courts. *Pacific Car and Foundry Co.* v. *Pence*, 403 F.2d at 952-3, *supra*.

1. Failure to Exercise Discretion.

Even assuming *arguendo* that the stricter requirements of judicial mandamus can appropriately be applied here, and that mandamus will issue only in the court's "sound discretion," but see Point III A *supra*, the court below nevertheless failed even to exercise that limited discretion (or more properly, to remand the proceedings to the district court for its exercise of discretion). In the cases cited by the court, the factors to be weighed in the exercise of sound discretion included the relative harm to be suffered by the parties, the possibility of duplicative litigation, and the possibility of irreparable injury and miscarriage of justice. *Pacific Car and Foundry Co.* v. *Pence*, 403 F.2d

949 (9th Cir. 1968); *Cmax Inc.* v. *Hall*, 300 F.2d 265 (9th Cir. 1962).

All of these criteria can be found in this case, indicating that "extraordinary" relief should be granted.

1. If no jurisdiction exists where the Reserve Center is located, Lt. Strait faces the irreparable injury of either reporting for military duty contrary to his belief of conscience or subjecting himself to the harsh, military penal domain.

2. Lt. Strait has already litigated this case at great expense both at the district court and court of appeals level and both courts have rendered decisions on the merits. To require him to start again from scratch in another district is most certainly a waste of judicial resources and an overbearing imposition on the litigants to the action.

3. In two thoughtful and thorough opinions, a three-judge panel of the court of appeals unanimously found there was no basis in fact for the Army's decision. Under the present opinion Lt. Strait must now subject himself to determination anew by a single district judge who may see matters from a different perspective and rule in an opposite manner. This would certainly be a miscarriage of justice.

4. Respondents could have sought a change of venue if they were inconvenienced, as the court below noted (A. 56, n. 7). Moreover, their adherence to the waivable personal jurisdiction objection on rehearing herein and their suggestion that either Indiana or Georgia would be suitable reveals them to be the real "forum shoppers" in these cases. *Arlen* v. *Laird*, —— F.2d —— (2d Cir. 1971).

5. Finally the hardship on Lt. Strait in the context of this case warrants resort to extraordinary remedies.

Thus, the court's reference to the principles of judicial mandamus and its application of those principles were both grossly in error.

2. Administrative Mandamus Not Discretionary.

The court was also in error in its view that mandamus jurisdiction over administrative action is discretionary. Administrative mandamus against federal agencies or officials under 28 U.S.C. §1361 is not committed to judicial discretion. Once the court determines that 1) there is a clear showing of erroneous official action and 2) that administrative remedies have been exhausted, then 3) the court can only refuse to grant relief if it finds that another adequate remedy at law exists.[26] *Hancock* v. *Laird*, 415 F.2d 234, 236 (9th Cir. 1969); *Carter* v. *Seamans*, 411 F.2d 767, 773 (5th Cir. 1969).

Here the Army had a clear, non-discretionary duty 1) to process Lt. Strait's application in accordance with its own regulations and 2) to base its ultimate decision on legal grounds, as determined by the record. *United States ex rel. Donham* v. *Resor*, 436 F.2d 751 (2d Cir. 1971). Its failure to do either in this case constitutes a clear showing of erroneous official action which is amenable to judicial relief in the nature of mandamus. 28 U.S.C. §1361. Furthermore, since Lt. Strait did not have another adequate remedy at

[26] *Whitehouse* v. *Ill. Cent. R. Co.*, 349 U.S. 366 (1955), cited by the court below is not to the contrary and is inapposite as well. The Court there was concerned with the irreparable harm criteria associated with injunctive relief, and moreover, it was unable to find a clear showing of erroneous official action inasmuch as administrative remedies had not been exhausted. Here administrative remedies have been exhausted and the threat of irreparable harm is clear.

law, the court had no discretion to refuse to exercise its mandamus jurisdiction.

C. *The Existence of Possible Habeas Corpus Jurisdiction in a Distant District Is Not Another Adequate Remedy at Law.*

While it is true that under certain limited circumstances, a court may decline to exercise mandamus jurisdiction, if it finds that another adequate remedy exists, *Carter* v. *Seamans*, 411 F.2d 767 (5th Cir. 1969), that doctrine carries its own limitations. Those limitations go to the question of whether the other remedy is really "adequate."

The court below improperly applied a gross generalization to the case at bar. A careful analysis of the doctrine that mandamus will not lie if another remedy exists reveals that the other remedy referred to has always been a statutorily created remedy at law. *Carter* v. *Seamans*, 411 F.2d 767, 771-2 and 774, *supra; United States ex rel. Girard Co.* v. *Helvering*, 301 U.S. 540, 544 (1937); L. JAFFE, *Judicial Control of Administrative Action* 177 (1965). Mandamus has never been foreclosed where only another extraordinary, non-statutory remedy existed. Rather the two remedies of mandamus and habeas corpus have been considered equally available. *United States ex rel. Schonbrun* v. *Commanding Officer*, 403 F.2d 371 (2d Cir. 1968); *United States ex rel. Clements* v. *Laird*, 3 SSLR 3863 (D. Md. 1971); *United States ex rel. Olsen* v. *Laird*, 3 SSLR 3774 (M.D. N.C. 1970). Indeed, under the Ninth Circuit's reasoning, even a common law mandamus action in the District of Columbia might be considered an adequate alternative remedy barring Section 1361 relief, a result in contravention of the statutory intent.

Moreover, for reasons discussed earlier, it can hardly be argued that the possible availability of habeas corpus in a

distant state, both generally and under the circumstances of this case, constitutes an effective alternative remedy which should bar the exercise of mandamus jurisdiction which otherwise concededly exists.[27] See, *Still* v. *Commanding Officer*, —— F. Supp. ——, 4 SSLR 3785 (N.D. Ala. 1971) (holding that mandamus jurisdiction exists in these reservist cases).

The court below has defeated the purposes underlying both the Great Writ and the Congressional intent expressed in 28 U.S.C. §1361. The District of Columbia Circuit noted that one of the purposes behind the enactment of §1361 was to alleviate "an absurd situation in which litigants with just claims against the federal government were compelled to travel long distances at considerable expense in order to prosecute their causes of action." *McKenna* v. *Udall*, 418 F.2d 1171, 1173 (D.C. Cir. 1969). Nevertheless, the Ninth Circuit has forced Lt. Strait into precisely such an "absurd situation" by finding the very statute designed to alleviate such results unavailable to him. Such a result is untenable.

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[27] The court of appeals apparently agreed that Lt. Strait's allegations of procedural irregularities could be reached via mandamus but felt that the court could not grant "complete relief" (A. 64). The court apparently did not consider the possibility that the court's pendent jurisdiction could be invoked to dispose of the case as justice required. See, *Romero* v. *Int'l Terminal Operating Corp.*, 358 U.S. 354 (1959); J. HANSEN, *The Jurisdictional Bases of Federal Court Review of Administrative Discharges from the Military II*, 4 SSLR 4001, 4005 (1971). An assumption of pendent jurisdiction in this case would have been most just and appropriate, especially after both the district court and court of appeals had considered and rendered decisions on the merits of the claim.

IV.

Judicial review is available pursuant to 5 U.S.C. §701, et seq. of the Administrative Procedure Act.

Like 28 U.S.C. §1361, the judicial review provisions of the Administrative Procedure Act (hereinafter A.P.A.), 5 U.S.C. §§701-4 create "nonstatutory" jurisdiction in the district courts to review federal agency actions. Although the two provisions achieve a similar result, there are subtle differences; the A.P.A. being broader in scope as regards the standard of review and form of relief that can be fashioned. 5 U.S.C. §703; cf. also, *Peoples* v. *U. S. Dept. of Agriculture*, 427 F.2d 561 (D.C. Cir. 1970).

Respondents here erroneously contend that A.P.A. jurisdiction is not available (Brief in Opposition to Pet. for Cert. 8). Their argument apparently derives from a misconstruction of those provisions of the A.P.A. which require resort to other statutorily created remedies, *e.g.*, 5 U.S.C. §§703-4. We are here concerned with an inherently "nonstatutory" form of review. This Court long ago made it abundantly clear that the A.P.A., in combination with the Declaratory Judgment Act, 28 U.S.C. 2201-2, may be used as an alternative to habeas corpus, even when the latter remedy is unquestionably available and the more traditional mode of review. *Brownell* v. *Tom We Shung*, 352 U.S. 180 (1956); *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955).

In *Tom We Shung* this Court said:

> "We conclude that . . . exclusion orders may be challenged by habeas corpus or by declaratory judgment action." 352 U.S. 184.

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> "It may be that habeas corpus is a far more expeditious remedy . . . [b]ut that fact may be weighed by the alien against the necessity of arrest and detention after which he may make his choice of the form of action he wishes to use. . . ." *Id.* at 186.

The obvious thrust of *Tom We Shung* and *Pedreiro* was their emphasis on the adequacy of the alternate remedy, and the conclusion that whether the alternative is adequate is a decision primarily for the petitioner to make whenever there are hardship factors associated with one of the remedies. (See discussion *supra* at p. 61.) In other words, the petitioner may choose to avoid those hardships by seeking a declaratory judgment pursuant to the A.P.A. This approach has been applied in at least one reported in-service conscientious objector case. *Berman* v. *Resor*, 302 F. Supp. 1200 (N.D. Cal. 1969); see also, *Robbins* v. *Reed*, 269 F.2d 242 (D.C. Cir. 1959) (prisoner allowed to use A.P.A. as alternative to habeas corpus to avoid harsh rule in the Circuit where he was incarcerated). This position is also supported by one of the leading scholars on judicial review of administrative action, Prof. Louis Jaffe, who has said that one function of the A.P.A. is " . . . to provide an additional, more flexible remedy. . . ." JAFFE, *Judicial Control of Administrative Action*, 372-4 (1965).

Respondents may also contend that the A.P.A. is not a jurisdictional statute, and/or that the action of the Army herein is excluded from its purview because it is discretionary in nature.[28] These contentions were conclusively disposed of in *Citizens to Preserve Overton Park* v. *Volpe*,

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[28] Certain military decision-making processes are also specifically excluded from the Act, but none of these exclusions is applicable here. 5 U.S.C. §§701(1)(F) and (G).

401 U.S. 402, 410 (1971). See also discussion at pp. 54-56, *supra*.

Consequently, the district court also had jurisdiction pursuant to the A.P.A. Despite the fact that such a jurisdictional basis existed and was pleaded, despite the fact that substantial authority exists supporting the petitioner's position, and despite the fact that the government never raised any significant argument in opposition thereto, both the district court and the court of appeals ignored these allegations. Lt. Strait firmly believes that had they not done so, they would have been compelled to conclude that jurisdiction existed.

V.

Federal question jurisdiction also exists pursuant to 28 U.S.C. §1331.

28 U.S.C. §1331 grants jurisdiction to the district courts to hear and determine cases involving questions of federal law. The statute thus grants the district courts jurisdiction to review federal agency determinations. Only two criteria exist for pleading a non-diversity case under 28 U.S.C. §1331:

> "(1) [T]hat the required jurisdictional amount is present and (2) . . . that the complaint . . . presents a substantial federal question." 6A Moore, *Federal Practice*, para. 57.23, p. 3136 (1966).

Consequently section 1331 has been extensively used as the jurisdictional basis for suits challenging decisions of the Selective Service System prior to induction. See, *Breen* v. *Selective Service Board No. 16*, 396 U.S. 460 (1970);

Oestereich v. *Selective Service System Local Board No. 11,* 393 U.S. 233 (1968); *Fein* v. *Selective Service System,* 430 F.2d 376 (2d Cir. 1970), *cert. granted,* 401 U.S. 953 (1971); *Wolff* v. *Selective Service Board No. 16,* 372 F.2d 817 (2d Cir. 1967); *cf.* also, *Berk* v. *Laird,* 429 F.2d 302 (2d Cir. 1970). This challenge to a highly analogous administrative decision of the Army, brought by a reservist about to be activated, creates a remarkably similar jurisdictional framework.

The only remaining issue is the question of jurisdictional amount. Many appellate courts have adroitly sidestepped the issue and have proceeded to the merits. E.g., *Breen* v. *Selective Service Local Board No. 16,* 406 F.2d 636, 637, n. 1 (2d Cir. 1969), *reversed on other grounds,* 396 U.S. 460 (1970). Petitioner submits that the proper rule was articulated by Judge Edelstein in *Boyd* v. *Clark,* 287 F. Supp. 561, 568 (S.D.N.Y. 1968), *aff'd without reaching the jurisdictional amount question,* 393 U.S. 316 (1969), namely, that freedom from interference with personal liberty as a result of an arbitrary governmental action "is inherently worth more than $10,000." Accord: *Cortright* v. *Resor,* 325 F. Supp. 797 (E.D.N.Y. 1971), *reversed on other grounds,* 447 F.2d 245 (2d Cir. 1971).

More importantly, however, Lt. Strait pleaded the existence of an amount in controversy exceeding $10,000, and that allegation has never been contested. He also stands ready to prove the existence of potential damages in excess of $10,000 in the event the case should be remanded to the district court to proceed pursuant to 28 U.S.C. §1331. Cf. *Oestereich* v. *Selective Service System, supra; Berk* v. *Laird,* 429 F.2d 302, 306 (2d Cir. 1970).

VI.

Conclusion.

For the reasons stated, the judgment of the Court of Appeals should be reversed, and the case should be remanded with instructions to reinstate the judgment and opinion of February 17, 1971.

Respectfully submitted,

January 7, 1972

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APPENDIX OF CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

CONSTITUTION OF THE UNITED STATES

Article I, Section 9

The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES

5 United States Code §701 (Supp. V, 1965-70)

Application; definitions.

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

5 United States Code §702 (Supp. V, 1965-70)

Right of Review.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 United States Code §703 (Supp. V, 1965-70)

Form and venue of proceeding.

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

5 United States Code §704 (Supp. V, 1965-70)

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. • • •

28 United States Code §1331(a) (1964)

Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 United States Code §1361 (1964)

Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or

employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 United States Code §1391(e) (1964)

A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

28 United States Code §2241(a) and (b) (1964)

Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

*AR 135-25

Headquarters
DEPARTMENT OF THE ARMY
Washington, D.C. *2 September 1970*

Army National Guard and Army Reserve

DISPOSITION OF CONSCIENTIOUS OBJECTORS

Effective 1 August 1970 in accordance with DA message RCPL 031400Z Aug 70

1. Purpose. This regulation prescribes policies, criteria, and procedures governing the disposition of Reserve members of the Army who claim to be conscientious objectors.

2. Applicability. a. This regulation applies to all Reserve members of the Army, except those specified in *b* below.

b. The provisions of AR 600-200, AR 614-106, and AR 635-20 govern the disposition of Reserve members of the Army who claim to be conscientious objectors and who are either—

(1) Serving in the active military service in their Reserve status; or

(2) Serving on initial active duty for training in their status as Reserves of the Army.

• • • • •

4. Policy. a. No vested right exists for an individual to be discharged at his own request by reason of conscientious objection prior to the expiration of his contractual or statutory obligation.

• • • • •

* This regulation supersedes AR 135-25, 17 June 1970, and DA message RCPL 031400Z Aug 70(U), subject: Interim Change to AR 135-25, 17 June 1970.

5. Eligibility for consideration. a. Consideration will be given to requests for discharge by reason of conscientious objection to participation in war, in any form, when such objection develops subsequent to the member's entry into military service, whether such entry was by induction, enlistment, or appointment in any component of the Army.

b. Federal courts have held that a claim to exemption from military service under Selective Service laws must be interposed prior to notice of induction, and failure to make timely claim for exemption constitutes waiver of the right to claim. However, claims based on conscientious objection growing out of experiences prior to entering military service, but which did not become fixed until entry into the service, will be considered.

c. Consideration will not be given to requests for discharge based solely on conscientious objection which—

(1) Existed but was not claimed prior to member's initial entry into military service either by induction or enlistment or appointment in any component of the Army; or

(2) Existed but was claimed and denied by Selective Service prior to member's induction into the active military service; or

(3) Based solely upon consideration of policy, pragmatism, or expediency; or

(4) Claims objection to a particular war.

6. Applications for discharge. Reserve personnel requesting discharge by reason of conscientious objection will submit such request in accordance with the following instructions:

• • • • •

(1) *Unit members.* ARGUS and USAR members assigned to units will submit their applications to the commanding officer of the unit to which assigned. Members of the inactive National Guard will submit their applications to commanding officer of the unit to which attached.

(2) *Nonunit members.* Ready Reserve nonunit members and Standby Reserve members will submit their applications to the oversea area commander; Commanding Officer, U.S. Army Reserve Components Personnel Center, Fort Benjamin Harrison, IN 46249; or the Commanding Officer, U.S. Army Administration Center, 9700 Page Boulevard, St. Louis, MO 63132, as appropriate.

7. *Procedures.* *a.* Commanders having custody of the member's records will take the actions preseribed below.

* * * * *

c. Area commanders will provide assistance upon request from the Commanding Officer, U.S. Army Reserve Components Personnel Center, or Commanding Officer, U.S. Army Administration Center, as appropriate, to arrange for necessary interviews of nonunit reservists residing in their geographical area of jurisdiction. Two copies of this regulation, application, and supporting papers will be furnished to the area commander for compliance with *b*(4) above. The Commanding Officer, U.S. Army Reserve Components Personnel Center, and Commanding Officer, U.S. Army Administration Center will be advised of the date, time, and facility where applicant should report for interview and are responsible for informing the applicant when and where to report for this purpose. Reports of interview

for nonunit reservists will be mailed direct to the Commanding Officer, U.S. Army Reserve Components Personnel Center, or Commanding Officer, U.S. Army Administration Center, as appropriate.

• • • • •

e. The application for discharge, together with the inclosure(s), DD Form 1589, reports of interviews, and the officer's recommendation or waiver required by *b*(3) above will be forwarded in quadruplicate (original and three copies) in accordance with *f* or *g* below, whichever is appropriate. The members Military Personnel Records Jacket, U.S. Army (DA Form 201) will also be included.

(1) The immediate commander's comment will include the following information:

(*a*) Whether approval or disapproval is recommended and the reasons therefor.

• • • • •

g. Applications submitted by USAR personnel will be forwarded through military channels to the Commanding Officer, U.S. Army Reserve Components Personnel Center, ATTN: RCPA, Fort Benjamin Harrison, IN 46249.

h. The Commanding Officer, U.S. Army Reserve Components Personnel Center, will convene a board of officers to determine findings and submit recommendations on all applications for discharge submitted under this regulation. The board will follow the general procedures set forth in AR 15-6. The format of the board proceedings will be prescribed by the Commanding Officer, U.S. Army Reserve Components Personnel Center.

ARMY REGULATION
No. 15-6

HEADQUARTERS
DEPARTMENT OF THE ARMY

WASHINGTON, D.C., *12 August 1966*

BOARDS, COMMISSIONS, AND COMMITTEES

PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS CONDUCTING INVESTIGATIONS

1. *Scope.* Investigating officers and boards of officers (which may consist of only one officer) are appointed by superior authority, usually under an Army regulation pertaining specifically to the matter requiring investigation. Generally, this regulation is supplemental to such specific regulations and, in addition, will govern in the investigation of matters not covered in specific regulations (e.g., whenever an officer is appointed to investigate a complaint under UCMJ, Art. 138). In case of conflict between this regulation and a pertinent specific regulation, however, the latter will govern. This regulation is not applicable to investigation of court-martial charges. *See Uniform Code of Military Justice, Article 32, and Manual for Courts-Martial, United States, 1951,* chapter VII. The promulgation of this regulation shall not invalidate any investigation or proceeding initiated prior to the receipt of this regulation and conducted in conformity with the existing regulation.

2. *Function.* The primary purpose of any investigation, whether conducted by an investigating officer or by a board of officers, is to ascertain facts and to report them to the

appointing authority as the basis for some appropriate action by him. It is the duty of any investigating officer or board to make a complete and impartial presentation of the evidence on both sides, and to make such findings and recommendations as may be appropriate and warranted by the facts. No person shall attempt to coerce, or by unlawful means influence, the actions of an investigating officer or board of officers in any matter whatsoever or the action of any superior authority acting upon the matter. The appointing authority will take whatever action he deems necessary to correct errors or irregularities in the proceedings of an investigating officer or board of officers. However, errors or irregularities which do not adversely affect the substantial rights of the individual(s) concerned or of the Government will not be deemed to render invalid the proceedings, or any action of the appointing authority, based thereon.

14. *Prejudicial allegations.* When matters prejudicial to the conduct, status, efficiency, fitness, character, or rights of an individual arise and become an issue during the course of the investigation, the investigating officer or board shall make the individual concerned a party, and make known to him in writing, the precise nature of the prejudicial allegations. Additionally, he will be entitled to counsel as provided in paragraph 8, permitted to examine such allegations or evidence, and afforded an opportunity to answer such allegations by the testimony of any witness or witnesses he may desire heard in his own behalf, and by written statements, sworn to if practicable, of himself and others he may desire to submit. Failure to afford any of the above rights will be fully explained in the record of proceedings. If the person concerned is unavailable for good cause, such as absence from the command, the above

requirements may be met by furnishing him a copy of the record of proceedings together with advice as to his right to present evidence. Subject to the rights of a witness as set forth in paragraph 13, the individual concerned may be called by the investigating officer or board and required to testify under oath upon any point involved concerning which he might be a material witness.

17. *Written brief.* The individual concerned or his counsel may submit a written brief covering the whole or any portion or phase of the case under investigation and, except for good cause shown, a reasonable time will be afforded him in which to submit it. To assist in preparation of this brief, the individual concerned or his counsel will, upon request and subject to security requirements, be allowed to examine the report of proceedings prior to action by the convening authority.

20. *Evidentiary basis.* Each finding must be supported by substantial evidence, which is defined as such evidence as a reasonable mind can accept as adequate to support a conclusion.

25. *Copies of reports.* Except as prescribed in paragraphs 14, 15, and 17, an investigating officer or board of officers is not authorized to furnish reports of investigation or copies thereof to anyone other than the appointing authority or his duly designated representative. After deletion of classified portions, one copy shall be furnished to each individual concerned. The appointing authority may furnish reports of investigation or copies thereof to others whose official duties entitle them to such; otherwise, the furnishing of copies is governed by the provisions of AR 345-20 and other pertinent regulations.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71–83

LT. JOHN A. STRAIT, PETITIONER

v.

HON. MELVIN A. LAIRD, SECRETARY OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals on rehearing (App. 71–74) is reported at 445 F. 2d 843. The court of appeals' initial opinion (App. 59–70) is not officially reported, and is unofficially reported at 3 SSLR 3784.

JURISDICTION

The judgment of the court of appeals on rehearing was entered on June 4, 1971. The petition for a writ of certiorari was filed on July 15, 1971, and was granted on November 16, 1971. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether at the request of a non-unit reservist who resides within the judicial district of the issuing court, a district court has jurisdiction to issue a writ of habeas corpus against the reservist's commanding officer located outside the court's territorial jurisdiction.

2. Whether, in the circumstances of this case, the district court has jurisdiction to review the Army's administrative denial of the reservist's conscientious objector claim under the mandamus provisions of 28 U.S.C. 1361 or under other statutes.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutory provisions and regulations are set forth in the Appendix, *infra*, pp. 39–61.

STATEMENT

Petitioner brought this action in the United States District Court for the Northern District of California for review of the Army's administrative determination that he is not entitled to a discharge as a conscientious objector. The district court held that it had jurisdiction to consider this matter, but denied petitioner's claim on the merits. Initially the court of appeals sustained the district court's ruling concerning jurisdiction, and reversed the court's decision on the merits. On rehearing, the court of appeals held that the district court lacked jurisdiction to entertain petitioner's suit, and remanded the case with instructions to dismiss.

1. Petitioner was commissioned a Second Lieutenant in the Military Police Corps of the United States Army Reserve in June 1966, after successfully completing the Army Reserve Officer Training Course at the University of California. His participation in the reserve program made him an obligated volunteer officer, with an active duty commitment of two years. He was permitted to defer his active duty obligation, however, in order to pursue a course of studies at Yale University Law School.[1]

As a reserve officer with a deferred active duty obligation, petitioner was assigned to the United States Army Reserve Components Personnel Center ("RCPC"), Fort Benjamin Harrison, Indianapolis, Indiana.[2] Like other deferred service reserve officers, he was not attached to a specific reserve unit during the delay in active service, and was not required to attend monthly drills or summer encampments. All matters pertaining to him were handled by the RCPC.

Upon graduation from law school in June 1969, petitioner returned to California to take the California bar examination. He requested, and received, a further deferment from active duty for this purpose.

---

[1] AR 601–25 (December 15, 1967, as amended), set forth in relevant part in the Appendix, *infra*, pp. 42–61, "prescribes policies, criteria, and procedures governing the delay in reporting for active duty * * * for members of the * * * Army Reserve (USAR)." Petitioner's active duty commitment was deferred under this regulation, which also governed his supervision in deferred status.

[2] In March 1971, the Center at Fort Benjamin Harrison, Indiana, was merged with the larger Army Reserve Components Personnel and Administration Center in St. Louis, Missouri.

On June 7, 1969, shortly after graduation from law school, petitioner accepted a promotion to First Lieutenant. During the summer he was processed in preparation for active duty, and, on July 9, 1969, was notified to report to Fort Gordon, Georgia, on February 9, 1970, to fulfill his two-year active duty commitment. On July 18, 1969, he took a medical examination and was found physically fit to enter active duty. The reporting date was later changed to April 13, 1970, to permit petitioner to retake the bar examination. During this entire period he remained in a deferred reserve status, assigned to RCPC.

On January 20, 1970, petitioner applied for a discharge from the Army as a conscientious objector. The application was submitted to and processed by the RCPC at Fort Benjamin Harrison, in Indiana, under applicable Army regulations.[3]

At the request of RCPC officials, interviews and hearings in processing the application were conducted at Fort Ord, California, and the results were forwarded to the Conscientious Objector Discharge Review

[3] In 1962 the Department of Defense promulgated regulations establishing an elaborate administrative review machinery for processing in-service conscientious objector claims. The present regulations are set forth in Department of Defense (DOD) Directive No. 1300.6 (May 10, 1968). The various branches of the Armed Services have issued regulations incorporating the provisions of DOD 1300.6 for processing particular servicemen under their respective jurisdictions; the Army has a separate regulation (AR 135-25 (September 2, 1970)), which "prescribes policies, criteria, and procedures governing the disposition of Reserve members of the Army who claim to be conscientious objectors." Petitioner's application was processed in accordance with this regulation.

Board at Fort Benjamin Harrison (AR 135–25, paras. 7c, 7h). The Board recommended that the application for discharge be disapproved, and on April 7, 1970, the RCPC Commander, Colonel John H. Hoffman, denied the application. The Army notified petitioner of the decision and confirmed that he was to report at Fort Gordon for active duty, as previously ordered, on April 13, 1970.

2. On April 9, 1970, petitioner initiated this action in the United States District Court for the Northern District of California. The complaint claimed various jurisdictional bases,[4] asserted that the denial of the conscientious objector discharge application "was wrongful and without basis in fact", and requested temporary and permanent relief, including discharge of petitioner from the Army (App. 4–17). The Secretary of Defense, the Secretary of the Army, and the commanding generals of the Sixth United States Army and of Fort Ord, California, and, by a later amendment, the RCPC commanding officer at Fort Benjamin Harrison, were named as respondents (App. 12, 16, 37–38), with the allegation that they were "the respective authorities who are unlawfully restraining the liberty of petitioner and should be required to

[4] The original complaint stated that jurisdiction was based, *inter alia*, on "the laws pertaining to jurisdiction of the court to issue a writ of habeas corpus (28 U.S.C. Sec. 2241(a)), * * * [and on the federal question jurisdiction] under 28 U.S.C. Sec. 1331(a) et seq. * * * " (App. 4). An amended complaint added as jurisdictional bases "the laws pertaining to an action in the nature of mandamus (28 U.S.C. Section 1361)" and "the Administrative Procedure Act (5 U.S.C. Sections 701–703, *et seq.*)" (App. 33; see *id.* at 34).

discharge petitioner [from the Army] as a conscientious objector pursuant to AR 135–25" (App. 35).

In response to an order to show cause (App. 30), the goverment asserted that the district court lacked jurisdiction, because, given his assignment to the Reserve Component Personnel Center at Fort Benjamin Harrison, in Indiana, petitioner was not in custody in the district nor was his custodian in the district. The court held, on the authority of *Donigian* v. *Laird*, 308 F. Supp. 449 (D. Md.), that petitioner was in the custody of the Army within its judicial district, and that the proper respondent was the RCPC commanding officer at Fort Benjamin Harrison, over whom the court could assert jurisdiction pursuant to 28 U.S.C. 1391 (e) (App. 52–53). The court subsequently ruled against petitioner on the merits.

The court of appeals originally affirmed the finding of habeas corpus jurisdiction and reversed the district court's decision on the merits (App. 59–70). On rehearing (App. 71–74), the court held that the intervening decision of *Schlanger* v. *Seamans*, 401 U.S. 487, compelled the conclusion that the district court lacked habeas corpus jurisdiction (App. 73):

> "Even if we concede that [petitioner] is in custody within the jurisdiction of the District Court * * *, his custodian—the commander of the Reserve Components Personnel Center at Fort Benjamin Harrison—remains outside the jurisdiction of that court. As stated in *Schlanger:* 'Hence, even if we assume that petitioner is "in custody" in Arizona in the sense that he is subject to military orders and control

> which act as a restraint on his movement * * * the absence of his custodian is fatal to the jurisdiction of the Arizona District Court.'"

Nor, the court concluded, contrary to petitioner's claim on rehearing, was mandamus appropriate since "the mandamus remedy would not afford complete relief," and since petitioner "may obtain relief by habeas corpus in the federal courts in Indiana, [and thus] there exists another adequate remedy" (App. 73, 74).[5] Remanding the case to the district court with directions to dismiss for want of jurisdiction, the court rejected without comment petitioner's arguments that jurisdiction would be appropriate under 28 U.S.C. 1331(a) (general federal question jurisdiction) or under the Administrative Procedure Act.

SUMMARY OF ARGUMENT

The jurisdictional question in this case concerns which federal court can hear a challenge by an unattached, non-unit Army reservist to the denial by the military of his claim to conscientious objector status. There is no dispute that such an administrative determination is subject to judicial review. The controversy rather is over which district court can properly undertake such review.

I

The issue with respect to habeas corpus jurisdiction is whether there is a proper respondent custodian

[5] The court indicated that while, unlike the situation with respect to habeas corpus, the district court did not lack mandamus jurisdiction (App. 74, n. 2), that remedy was not proper as a matter of "sound discretion" (App. 73).

within the territory of the California district court. As this Court's recent decision in *Schlanger* v. *Seamans* makes clear, the physical presence of a custodian within the court's district is an essential element for habeas corpus; the absence of this requirement "is fatal to the [habeas corpus] jurisdiction" of the court (401 U.S. 487, 491).

In the instant case, this requirement is not met. Neither of the California commanders named as respondents had custody or control over petitioner during the period in question. The remaining respondents are officially resident outside the territory of the district court. This is precisely the situation with which this Court was faced in *Schlanger*, and the Court's holding, equally applicable to the present case, is unmistakable: where the district court "has no custodian within its reach against whom its writ can run," that absence is "fatal" to the court's habeas corpus jurisdiction (401 U.S. at 491).

The requirement that there be a custodian within the court's territory reflects the fact that the writ is operative against the custodian alone. The court can grant effective relief only if it is able to compel the custodian to obey its mandate, and that in turn depends on the custodian being physically present in the district. Petitioner's suggested "presence-through-contacts" theory has no application to the requirement of a custodian for habeas corpus jurisdiction. Nor does the general venue provision in 28 U.S.C. 1391(e) modify the jurisdictional prerequisites for habeas corpus.

The judicial district in which deferred reservists like petitioner must commence a habeas corpus action is where their custodian—the RCPC Commander—is located. There is no jurisdictional impediment to bringing suit in that district if petitioner is actually present at that place when the action is filed, since the requisites for habeas corpus (custody and custodian) would then be met. Nor would this pose any real hardships for petitioner. He and his counsel could travel to the RCPC quickly and without undue expense, and would not need to stay there. Litigation time would be no greater there than in any other district. This requirement would not significantly increase the caseload in the judicial district where the RCPC is situated, in view of the small number of conscientious objector applications by non-unit reservists that are rejected.

II

None of the other statutes urged by petitioner provides an appropriate basis for this suit.

The requirements for an action "in the nature of mandamus" under 28 U.S.C. 1361 are not present here. Petitioner has not shown that he has a clear right to the relief he seeks or that the Army is under a clear duty to discharge him. Quite the contrary, the military's decision denying him conscientious objector status on the basis of appropriate legal standards and factual information calls for precisely the type of exercise of discretion and judgment that precludes relief by way of mandamus. And the writ of mandamus is not available where another alternative remedy exists, such as petitioner had here by a habeas

corpus suit in a proper jurisdiction. At all events, the relief that petitioner is seeking—discharge from the Army—cannot be obtained by mandamus in this situation.

The remaining provisions on which petitioner relies are not appropriate bases for a court to exercise jurisdiction. By its terms, the Administrative Procedure Act is not applicable here. It permits review only if there is "no other adequate remedy in a court" (5 U.S.C. 704), and that is not so in the instant case because a habeas corpus suit is available in the district court where the RCPC is located. It is proper for district courts located elsewhere to decline to exercise jurisdiction under Section 1331(a) on this same ground, especially where, as in this case, the only relief sought is discharge from the military.

ARGUMENT

I

THE CALIFORNIA DISTRICT COURT LACKS HABEAS CORPUS JURISDICTION BECAUSE PETITIONER HAS NO CUSTODIAN WITHIN THAT COURT'S JUDICIAL DISTRICT

The habeas corpus jurisdictional issue in this case is quite narrow. In our view, it is essentially the same question as that which the Court considered this past Term in *Schlanger* v. *Seamans*, 401 U.S. 487. Here, as in *Schlanger*, we do not dispute that petitioner is "in custody" as that term is used in the habeas corpus statute (28 U.S.C. 2241), since, as a reserve officer, he is subject to military orders and control which act as a restraint on his freedom. See *Hammond* v. *Lenfest*, 398 F. 2d 705 (C.A. 2); *Silberberg* v. *Willis*, 420 F.

2d 662 (C.A. 1); *Bohnert* v. *Faulkner*, 438 F. 2d 747 (C.A. 6); *Arlen* v. *Laird*, C.A. 2, No. 71–1446, decided October 28, 1971; *Meck* v. *Commanding Officer*, C.A. 3, No. 19,276, decided November 22, 1971; cf. *Jones* v. *Cunningham*, 371 U.S. 236, 240; *Gillette* v. *United States*, 401 U.S. 437, 440 n. 2.[6] Nor do we in this Court dispute that non-unit reservists with deferred active duty obligations, like petitioner, are in custody within the district where they reside pursuant to Army authorization. See the opinion below (App. 73); *Schlanger*, *supra*, 401 U.S. at 491.[7] The only issue

[6] Various district courts have held that the restraints imposed by the military on a reserve officer like petitioner, with a deferred active duty obligation (see n. 1, *supra*), are sufficient to satisfy the "in custody" requirement for issuance of habeas corpus. See, *e.g.*, *Nason* v. *Secretary of Army*, 304 F. Supp. 422, 424 (D. Mass.); *Donigian* v. *Laird*, 308 F. Supp. 449, 451, 452 (D. Md.); *United States ex rel. Armstrong* v. *Wheeler*, 321 F. Supp. 471, 474 (E.D. Pa.).

[7] The district courts are empowered to issue writs of habeas corpus only "within their respective jurisdictions" (28 U.S.C. 2241). This phrase limits the habeas corpus jurisdiction of the district courts "to inquiries into the causes of restraints of liberty of those confined or restrained within the territorial jurisdiction of those courts." *Ahrens* v. *Clark*, 335 U.S. 188, 190. Thus, a district court has jurisdiction to issue a writ of habeas corpus only if the petitioner is detained within the boundaries of its district. *Whiting* v. *Chew*, 273 F. 2d 885 (C.A. 4); *Webb* v. *Beto*, 362 F. 2d 105 (C.A. 5); *United States ex rel. Van Scoten* v. *Commonwealth of Pennsylvania*, 404 F. 2d 767 (C.A. 3); *George* v. *Nelson*, 410 F. 2d 1179 (C.A. 9), affirmed on other grounds, 399 U.S. 224; but see *Word* v. *North Carolina*, 406 F. 2d 352, 358–361 (C.A. 4). Compare *United States ex rel. Meadows* v. *State of New York*, 426 F. 2d 1176 (C.A. 2). The jurisdictional principle of *Ahrens* is fully applicable in the military context. See, *e.g.*, *United States ex rel. Rudick* v. *Laird*, 412 F. 2d 16 (C.A. 2), certiorari denied, 396 U.S. 918; *Jarrett* v. *Resor*, 426 F. 2d 213 (C.A. 9).

presented here relates not to the bounds of custody but to the absence of a custodian, and the crucial question is whether reservists like petitioner can bring a habeas corpus suit for release from the military in a court which does not have within its judicial district their commanding officer.

A. THE CALIFORNIA DISTRICT COURT LACKS JURISDICTION TO ENTERTAIN A HABEAS CORPUS ACTION BECAUSE NO "CUSTODIAN" IS PHYSICALLY PRESENT WITHIN THE COURT'S JURISDICTION

The physical presence of a custodian within the territorial jurisdiction of the court is an essential element of jurisdiction to issue habeas corpus. As this Court said in *Schlanger* v. *Seamans*, 401 U.S. 487, 491, there must be a "custodian within * * * [the district court's] reach against whom its writ can run * * *, the absence of [which] * * * is fatal to the [court's habeas corpus] jurisdiction * * *." See also *Ex parte Endo*, 323 U.S. 283, 306–307; *Jones* v. *Cunningham*, *supra*, 371 U.S. at 244; *United States ex rel. Keefe* v. *Dulles*, 222 F. 2d 390 (C.A.D.C.), certiorari denied, 348 U.S. 952; *United States ex rel. Rudick* v. *Laird*, 412 F. 2d 16 (C.A. 2), certiorari denied, 396 U.S. 918; see also *Ahrens* v. Clark, 335 U.S. 188, 198–205 (Rutledge, J., disenting). Unles this jurisdictional requirement is met, the court is powerless to issue a writ of habaes corpus since it is a "restriction * * * which Congress has placed on the power of the District Court to act" (*Ahrens* v. *Clark*, *supra*, 335 U.S. at 193). That Congress has intended to impose this limitation on jurisdiction is clear both from this

Court's interpretation of the import of earlier statutes, *Wales* v. *Whitney*, 114 U.S. 564, 574, and from the language of the present provisions, especially Section 2243 of Title 28 which specifies that the writ of habeas corpus "shall be directed to the person having custody of the person detained." [8]

In this suit, this jurisdictional requirement is not met. The respondents are (1) the Secretary of Defense, (2) the Secretary of the Army, (3) the commander of the Sixth United States Army, (4) the commander of Fort Ord, California, and (5) the RCPC commander at Fort Benjamin Harrison, Indiana. Although the commanders of the Sixth Army and of Fort Ord were physically present within the North-

[8] There has developed recently in the criminal law area a division among the circuits over the question whether a prisoner "in custody" in one judicial district, who seeks to challenge an outstanding detainer filed against him in another jurisdiction, may proceed by way of habeas corpus where he is confined, or should institute his suit in the judicial district in which the detainer is filed. Compare *United States ex rel. Van Scoten* v. *Commonwealth of Pennsylvania*, *supra*, with *Word* v. *North Carolina*, *supra*. We note, however, that where a prisoner had heretofore been permitted to proceed with such a suit in the jurisdiction of confinement, it has been only because the outstanding foreign detainer allegedly has an adverse effect on his present "custody"; it is thus the behavior of the present "custodian" that is in fact being challenged and suit is being maintained where he is located. See *George* v. *Nelson*, *supra*. Similarly, where the habeas corpus suit has been permitted in the jurisdiction in which the detainer was filed (although there was arguably no present "custody" there), the decision focused on the fact that it was there that the custodian under the outstanding detainer could be found. See *Word* v. *North Carolina*, *supra*, 406 F. 2d at 360; *United States ex. rel. Meadows* v. *State of New York*, *supra*.

ern California judicial district[9] when this action was commenced, neither had command authority over petitioner. The Sixth Army commander, though he was area commander in California, had jurisdictional control only over those reservists who did not have the special non-unit, deferred status enjoyed by petitioner (see AR 601–25, Appendix, *infra*, pp. 44, 48, 54). He had no authority over non-unit reservists; they were not subject to his orders, were not under his supervision, and were not required to report their activities to him.[10]

Similarly, petitioner was not under the command authority of the Commanding General at Ford Ord. Even when petitioner visited that base for the interviews in connection with processing his conscientious objector discharge application, he was not subject to military orders of the base commander. He was at Fort Ord for his own purpose and convenience. Indeed, at that time his relationship with the Fort Ord commander was essentially no different from Sgt.

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[9] The commander of the Sixth Army has his headquarters at San Francisco, and the Fort Ord commander is located at the base, near Salinas, California.

[10] Petitioner speculates (Br. p. 35) that the area commander did have authority to place him under military arrest if he "disobeyed an order issued from the Center in Indiana." However, such authority would arise only if an arrest order was given by the officer having "jurisdictional control" over petitioner, *i.e.*, the commander at RCPC. In such an event, presumably he would be subject to arrest wherever he was found. But the arresting officer would not be his "custodian" until the arrest occurred. See, *e.g.*, *Meck* v. *Commanding Officer*, *supra*. Under petitioner's view, the potential authority to arrest a serviceman for disobeying orders would make an area commander "custodian" for habeas corpus purposes over all servicemen within his territory, irrespective of their assigned units.

Schlanger's relationship with the ROTC commander at the University of Arizona during the period he was attending classes there under a separate Air Force program. See *Schlanger* v. *Seamans, supra,* 401 U.S. at 488–489. Moreover, petitioner's suit does not relate to any "custody" to which he might have been subjected at Fort Ord—any such custody ended long ago—but instead to his continued supervision by the RCPC at Fort Benjamin Harrison.

The fact is that petitioner was never assigned to any unit or any commander in California. He traveled there instead on his own, following completion of the graduate program (law school) for which he had obtained the deferral of his active duty obligation. His active duty, which normally would have started promptly upon graduation (see AR 601–25, para. 2–10a, Appendix *infra.* p. 53), was delayed at his request, so that he could take, and retake, the bar examination. And his stay there was certain to be only temporary, as he was under orders to report for active duty in Georgia virtually from the time he left law school and throughout his stay in California. Neither of the California commanders named as respondents had custody or control over him during any of this period.

The other three named respondents did not reside in the judicial district in which petitioner filed suit. The Secretary of Defense and the Secretary of the Army are both located in Washington, D.C., and thus are not within the court's territory. Furthermore, while either could be said to have nominal custody

and control over petitioner, at least insofar as each bears the ultimate responsibility for all those under his command, neither is a proper "custodian" for purposes of habeas corpus jurisdiction. See *United States ex rel. Rudick* v. *Laird, supra,* 412 F. 2d at 21; *Donigian* v. *Laird, supra,* 308 F. Supp. at 452. Rather it is the most immediate commander within the chain of command against whom the writ must issue. Cf. *Schlanger* v. *Seamans, supra,* 401 U.S. at 488.

Colonel John H. Hoffman, the RCPC Commander at Fort Benjamin Harrison, Indiana,[11] is the only proper respondent "custodian" for purposes of habeas corpus. It is he who had "jurisdictional control" over petitioner (AR 601–25, Appendix, *infra,* pp. 48, 54–56); he retained petitioner's military records, granted or denied his requests for further postponements from active duty, and ultimately issued the activation orders. In short, whatever the authority exercised over petitioner by the military, the RCPC Commander was alone responsible. Consequently, the only court competent to issue a writ of habeas corpus was the one within whose territorial limits Colonel Hoffman was.

[11] Due to the transfer of all records at Fort Benjamin Harrison to the United States Army Reserve Components Personel and Administration Center located in St. Louis, Missouri (n. 2, *supra*), petitioner is no longer under Colonel Hoffman's command. Rather, his immediate commander would now be Brigadier General Probst, the commander in St. Louis.

B. PETITIONER'S STATUS AS A DEFERRED SERVICE RESERVE OFFICER DOES NOT ALTER THE REQUIREMENT OF A CUSTODIAN'S PRESENCE IN THE COURT'S JURISDICTION OR RENDER THE HOLDING OF *SCHLANGER* V. *SEAMANS* INAPPLICABLE

Petitioner urges that for a number of reasons the ruling in *Schlanger* is inapplicable to deferred service reserve officers like himself. In our view, petitioner's assertions do not touch on the real basis of the *Schlanger* decision.

1. In *Schlanger*, just as in the present case, the petitioner's commanding officers were neither residents of the judicial district in which he brought suit nor amenable to the district court's process for habeas corpus purposes. In these circumstances, the Court explained, "[t]he question * * * is whether any custodian or one in the chain of command, * * * must be in the territorial jurisdiction of the District Court" (401 U.S. at 489). The Court's holding is unmistakable—where the district court "has no custodian within its reach against whom its writ can run," that absence is "fatal to the jurisdiction" of the court (*id.* at 491).

Since that is precisely the situation in the present case, the court of appeals correctly held that *Schlanger* "compels" the conclusion that the district court below had no jurisdiction to consider petitioner's habeas corpus claim (App. 73). Accord, *Berman* v. *Resor*, C.A. 9, No. 71-1528, decided July 8, 1971, petition for

a writ of certiorari dismissed, No. 71–205, November 10, 1971; *Lipinski* v. *Resor,* C.A. 1, Misc. No. 490, motion for stay and injunction pending appeal denied, July 14, 1971; cf. *Robin* v. *Hoffman,* C.A. 3, No. 71–1581, motion for temporary restraining order pending appeal denied, July 2, 1971; *Smith* v. *Cambell,* C. A. 9, No. 71–1443, decided October 11, 1971; *Meck* v. *Commanding Officer, supra; Still* v. *Commanding Officer,* N.D. Ala., Civil Action No. 71–616, decided November 17, 1971; but see *Arlen* v. *Laird, supra.*

2. Petitioner urges that there are significant differences between deferred reservists and servicemen on active duty, such as Sgt. Schlanger. He points out that he has never been a member of a functioning military unit or physically present at his command unit (the RCPC), and asserts that habeas corpus jurisdiction in California would not deprive the Army of his services by altering his active duty obligations (Br. 17–18). He also claims that the hardships that the *Schlanger* rule would cause a deferred reservist, as well as other policy and practical considerations, militate against applying it to such persons (*id.* at 19, 39–46).

But these considerations do not relate to the location of petitioner's custodian or affect the statutory requirement that there be a custodian within the district court's territory. This prerequisite for habeas corpus jurisdiction reflects the fact that the writ is operative against the custodian alone, against whom Section 2243 requires that it be directed. Accordingly, effective relief depends upon the court's ability to

compel the custodian to obey its mandate; in short, there must be a custodian within the court's reach "against whom its writ can run" (*Schlanger* v. *Seaman's supra,* 401 U.S. at 491) since Congress has not given the district courts the power to enforce the writ outside the limits of their respective judicial territories. See *Ex parte Endo, supra,* 323 U.S. at 306; *Ahrens* v. *Clark, supra,* 335 U.S. at 195–197 (Rutledge, J., dissenting). Petitioner's policy arguments, even if more persuasive than we consider them to be (see pp. 24–27, *infra*), could not serve to broaden the strictures that Congress has thus placed on habeas corpus jurisdiction. Compare *Ahrens* v. *Clark, supra,* 335 U.S. at 192–193.

The Second Circuit in *Arlen* v. *Laird* mistakenly read *Schlanger* as reserving decision on the "precise question" (slip op. at 227) raised by this case. The court in *Schlanger* did not intimate any exception to the requirement that a custodian must be present within the jurisdiction.[12] And the "presence-through-

[12] The *Arlen* court said (slip op. at 227):

> *Schlanger,* as we view its holding, does not preclude a district court, with jurisdiction over the territory in which an unattached reservist is in custody and in which he resides and works, from entertaining his petition for *habeas corpus* solely because his nominal "commanding officer" is not physically present in the jurisdiction. The Supreme Court reserved decision on this precise question, 401 U.S. at 489, 491 n. 5, and cited, apparently with approval, *Donigian* v. *Laird* * * *.

In fact, the Court's comments in *Schlanger* did not relate to the presence of a custodian, but instead concerned "only * * * the question whether such [habeas corpus] applicant can be said to be in custody" (*Lipinski* v. *Resor, supra*).

contacts theory" suggested by petitioner (Br. 31), on which the *Arlen* court apparently relied, has no application to habeas corpus jurisdiction, since the respondent's actual presence is essential to the effectiveness of the writ.[13]

Petitioner argues that the Court's emphasis in *Schlanger* on the presence of a custodian indicates only a concern that the district court have jurisdiction over the person of the custodian. The single requirement for subject matter jurisdiction, his argument goes, is custody within the court's territorial district. Under this view the only question with respect to a custodian is merely one of "personal jurisdiction"—whether a proper custodian is amenable to process in the district court. Petitioner urges that the court could obtain jurisdiction over his custodian under 28 U.S.C. 1391(e).[14]

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[13] The contacts theory of jurisdiction has evolved in a context bearing no resemblance to the present case. In *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, and *International Shoe Co.* v. *Washington*, 326 U.S. 310, this theory was invoked to permit a plaintiff to obtain a judgment against a defendant in a jurisdiction where the defendant, though not physically present when suit was brought, had had substantial contacts. The fact that judgment was entered against the defendant did not, by itself, have any effect on him; the court was powerless to order execution on the absent defendant, and enforcement of the judgment required an order from a court where he (or his property) was located. In the habeas corpus area, by contrast, a judgment is not of any use; the whole purpose of the writ is to control the respondent, by being able to compel him to act, which in turn requires that he be physically within the court's reach.

[14] In effect, petitioner seeks a rule that would entitle reservists on deferred status to assert habeas corpus claims wherever

The basic premise on which this argument rests is, of course, contrary to the holding of *Schlanger* that the requirement that a person having immediate custody over the petitioner must be within the court's judicial district is a fundamental prerequisite for habeas corpus jurisdiction (401 U.S. at 491). Nor can this holding be explained away as simply dealing with personal jurisdiction. Instead, its plain import is "that absence of any custodian or commander results in a lack of jurisdiction over the subject matter of a *habeas* petition * * *." *Still* v. *Commanding Officer, supra,* slip op. at 3. *Schlanger* rejected any notion that Section 1391(e), a general venue statute, modifies the jurisdictional requirements for habeas corpus (see 401 U.S. at 490, n. 4).[15]

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they reside. In a real sense, such persons are in much the same situation as an active duty serviceman "on leave", who is permitted to bring suit only in the district where his commanding officer is located. See, *e.g.*, *United States ex rel. Rudick* v. *Laird*, *supra; Jarrett* v. *Resor*, *supra*. The analogy is especially fitting here. Petitioner had completed his schooling in Connecticut, for which the Army had deferred his active duty, and was in California, on his own, for only a brief period while awaiting the date set for activation. There is no indication that he could not have gone to or lived in any state or number of states, without Army permission, during this time. Moreover, his final destination and active duty date were fixed, by reason of the activation orders that he was under virtually from the time he left law school to report for active duty in Georgia. In all these respects, petitioner's situation was much like the furloughed soldier.

[15] As the Court observed in *Schlanger* (401 U.S. at 490, n. 4), Section 1391(e) "was enacted to broaden the venue of civil actions which could previously have been brought only in the District of Columbia." There has never been any such limitation, however, on habeas corpus actions, which could be brought

The cases petitioner cites for the proposition that Section 1391(e) can be used "once subject matter is found to exist" (Br. 33) are not applicable here. To be sure, where "the petitioner and his custodian * * * were within the territorial jurisdiction of the district court at the time the petition for writ of habeas corpus was filed," the district court may have habeas corpus jurisdiction even though the custodian subsequently leaves the territory. *Smith* v. *Campbell, supra,* slip op. at 8; see also *Ex parte Endo, supra,* 323 U.S. at 305–306; *Jones* v. *Cunningham supra,* 371 U.S. at 243–244. But the absence of petitioner's custodian kept the court below from ever having subject matter jurisdiction over petitioner's suit.[16]

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against appropriate custodians in federal district courts throughout the country; thus, Section 1391(e) is not needed in habeas corpus proceedings, and nothing in the legislative history of that section suggests that it was intended to apply to such proceedings or to "extend habeas corpus jurisdiction" (*ibid.*). See *Lipinski* v. *Resor, supra; Still* v. *Commanding Officer, supra.* The explicit reference in the venue legislation to the Federal Rules of Civil Procedure—which at that time expressly excluded habeas corpus proceedings from their reach (Rule 81(a)(2), Fed. R. Civ. P.)—reinforces this reading. See *Harris* v. *Nelson*, 394 U.S. 286, 294.

[16] Petitioner's further claim (Br. 34–35) that the requisite jurisdiction over his custodian can be established here by asserting jurisdiction over his custodian's "agent" in California, the commander of the Sixth Army, is insupportable. As we have pointed out, the Sixth Army commander was never in petitioner's chain of command, and thus is not himself a proper respondent; and petitioner's complaint does not relate to any "custody" that that officer may have asserted as agent for petitioner's real custodian, the RCPC commanding officer. See pp. 13–15, and n. 10, *supra.*

3. As we have discussed, the judicial district in which a deferred reservist must commence his habeas corpus action is the one where his custodian is located, *Schlanger* v. *Seamans, supra,* in this case the district where the RPCP commander is officially resident. Petitioner is mistaken in suggesting (Br. 19–20, 36–38, 45–46) that there is any jurisdictional impediment to deferred reservists such as petitioner bringing a habeas corpus action in that judicial district. Since the "custody" of which such persons complain is not physical confinement or detention, but rather derives solely from the fact that they are subject to certain military orders, the restraint on liberty is felt wherever such persons happen to be. Indeed, petitioner recognizes as much, in pointing out that what really is involved here is a "concept of figurative rather than physical custody," under which "the courts should presume * * * that the confinement exists where the petitioner is located" (Br. 16, 28).

In our view, petitioner, because of his special status as a deferred reservist, would be as much "in custody" where his RCPC commander is, if he was physically present there, as he would be in California when located there. See *Donigian* v. *Laird, supra,* 308 F. Supp. at 451–452; see also *Schlanger* v. *Seamans, supra,* 401 U.S. at 489, 491. Thus, the territorial rule stated in *Ahrens* v. *Clark, supra,* 335 U.S. 190–191, is fully satisfied when a reservist situated like petitioner enters the judicial district in which the RCPC commander is located; at the time that he files his suit, there is a concurrence of "custody" and "custodian"

within the territorial jurisdiction of a single district court.[17]

The hardships which petitioner claims that he would undergo if he is required to litigate his claim where the RCPC is located do not support a different result. The main thrust of petitioner's argument is that it would be more difficult, expensive and time consuming to litigate a case in another state. He could, however, make a trip by plane from his home in California to Indiana (or Missouri) in a matter of hours. Moreover, while this would entail some expense, we are presumably not confronted in this case with a situation in which the complaining reservist is unable to afford the plane fare; petitioner has alleged in his amended complaint (App. 33) that his financial situation is such that entry into active military service would result in a loss to him of "the sum or value of $10,000, exclusive of interest and costs." Of course, if petitioner had but waited another four days to commence the present suit, he woud have been transported to Fort Gordon, Georgia, at Army expense, and thus could have brought the present suit there without undergoing any additional expense.[18]

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[17] Some district courts have concluded that a non-unit reservist is "in custody" only where he engages in the activity for which the military defers his active service. See *Nason* v. *Secretary of Army*, *supra*, 304 F. Supp. at 424; *United States ex rel. Armstrong* v. *Wheeler*, *supra*, 321 F. Supp. at 475–476. We believe that position incorrect.

[18] We think that there is little merit to petitioner's assertion that reporting for active-duty before filing suit imposes a "most onerous hardship" because "the reservist wants a judicial ruling on whether or not he has to go on active duty before, not after, he has done so" (Br. 41, 43). The issue here is not whether

There would be no need to employ different counsel in this situation, since existing counsel could, of course, travel to the RCPC as easily as petitioner. Nor would either petitioner or his counsel need actually be at that location except to commence suit or present matters to the court. If petitioner were physically in the district when suit was filed, the habeas corpus requisites would then be satisfied (see pp. 23–24, *supra*); his later absence would not cause the court to lose jurisdiction. See *Ex parte Endo, supra,* 323 U.S. at 306; *Jones* v. *Cunningham, supra,* 371 U.S. at 243–244; *Smith* v. *Campbell, supra*; *Meck* v. *Commanding Officer, supra.*

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petitioner must go on active duty, but whether he is entitled to discharge from the Army; by reason of his earlier commitment through the ROTC program, he became a member of the armed forces, and his activation is nothing more than the inevitable culmination of his prior actions. Though petitioner contends that activation might bring about a conflict between his military duties and his views as a conscientious objector, this, of course, assumes that he in fact qualifies as a conscientious objector. This is an issue which has not yet been resolved. Moreover, if petitioner's duties following activation threatened to impinge unduly on his asserted status, the Georgia district court could provide adequate protections for him in the course of considering his habeas corpus suit, just as the California district court did in the present case.

It is relevant that draftees, who unlike petitioner have not voluntarily undertaken military obligations, cannot obtain judicial review of rejected conscientious objector claims unless they submit to active military duty or risk criminal conviction. Petitioner, who may obtain prior judicial review in the district where the RCPC commander is located, is, in fact, in a much less onerous position.

The time that it would take to litigate a suit in the district where the RCPC is located would be no greater than in any other district. Habeas corpus suits must be processed expeditiously in all federal courts. See 28 US.C. 2243, Appendix, *infra,* pp. 41–42.

Amici curiae argue that requiring the suit to be brought at the RCPC would result in "a very significant mushrooming of [the] caseload" in a single judicial district (*Am. Cur.* Br. 5–6). Such a prospect, however, appears unlikely. For, contrary to the reservist statistics provided in the brief of *amici curiae*—which relate to all those in Army reserve status, most of whom already have completed their active duty obligation [19]—the number of reservists in petitioner's status is relatively few. We are advised that, as of December 31, 1971, approximately 13,000 reserve officers have been deferred from active duty to pursue graduate studies. About 10,000 are, like petitioner, deferred under AR 601–25; the remaining 3,000 are med-

[19] Most Army non-unit reservists are servicemen who have completed their active-duty obligation and remain in the military in reserve status. A large percentage of this group is in the Retired Reserves. The remainder are essentially those who are fulfilling their statutory obligation after two years of active duty—generally a six-year commitment—but are not attached to any reserve unit or required to report to any command authority. All are under the jurisdiction of the Army Reserve Components Personnel and Administration Center in St. Louis, Missouri; however, they are assigned to different area "Control Groups" for administrative purposes. Only in the event of a national emergency may they be called to active duty. Should a member of this larger group of non-unit reservists claim conscientious objector status—which rarely, if ever, happens—we would urge that judicial review of his claim be treated in the same manner as petitioner's claim.

ical specialists, deferred under essentially the same procedures under AR 601-26. See *Donigian* v. *Laird, supra.* During 1971, the RCPC processed a total of 84 conscientious objector claims by deferred reserve officers, of which only 39 were denied and thus might have resulted in litigation in the civil courts.

II

THE DISTRICT COURT SHOULD NOT REVIEW PETITIONER'S CLAIM ON THE BASIS OF THE OTHER JURISDICTIONAL PROVISIONS WHICH HE ASSERTS.

A. MANDAMUS JURISDICTION CANNOT BE INVOKED TO REVIEW A DENIAL BY THE MILITARY OF A CLAIM OF CONSCIENTIOUS OBJECTION.

Petitioner also suggests that he can gain access to the courts in a case of this sort through an "action in the nature of mandamus to compel an officer * * * of the United States or any agency thereof to perform a duty owed to the plaintiff," under 28 U.S.C. 1361. We disagree. A suit challenging the judgment of the military in denying conscientious objector status on the basis of the factual information submitted calls for precisely the type of judicial review of administrative discretion that Congress intended to exclude from mandamus jurisdiction under the 1962 Act.

Section 1361 of Title 28 prescribes that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus * * *" with respect to federal officials and agencies. This provision authorizes federal district courts outside the District of Columbia to review and compel official action on

the same basis as the federal district court in the District of Columbia; it does not enlarge the scope of mandamus relief under the common law writ. *Prairie Band of Pottawatomie Tribe of Indians* v. *Udall,* 355 F. 2d 364 (C.A. 10), certiorari denied, 385 U.S. 831. See H. Rep. No. 536, 87th Cong., 2d Sess., pp. 1–2; S. Rep. No. 1992, 87th Cong., 2d Sess., pp. 2, 4; 107 Cong. Rec. 12157; 108 Cong. Rec. 18783–18784, 20093–20094; see also *Carter* v. *Seamans,* 411 F. 2d 767, 773 (C.A. 5); *Jarrett* v. *Resor, supra,* 426 F. 2d at 216; *McEachern* v. *United States,* 212 F. Supp. 706, 712 (W.D.S.C.); *Guffanti* v. *Hershey,* 296 F. Supp. 553, 555 (S.D. N.Y.)

A mandamus action is available only where "it appears that the claim is clear and certain and the duty of the officer is ministerial and so plainly prescribed as to be free from doubt." *Jarrett* v. *Resor, supra,* 426 F. 2d at 216. And, while mandamus may be used "to require the exercise of permissible discretion," it is not to be invoked to "direct the manner in which discretionary acts are to be performed" (*McQueary* v. *Laird,* C.A. 10, No. 708–70, decided October 21, 1971, slip op. at 7), and cannot be employed "to direct the retraction or reversal of action already taken" in the exercise of judgment or discretion (*Wilbur* v. *United States,* 281 U.S. 206, 218). See *Panama Canal Co.* v. *Grace Line, Inc.,* 356 U.S. 309; *Casarino* v. *United States* 431 F. 2d 775 (C.A. 2); compare *Miguel* v. *McCarl,* 291 U.S. 442. "Generally speaking, before the writ of mandamus may properly issue three elements must coexist: (1) a clear right in the plaintiff to the

relief sought; (2) a clear duty on the part of the defendant to do the act in question; and (3) no other adequate remedy available." *Carter* v. *Seamans, supra,* 411 F. 2d at 773.

None of those elements is present here. Moreover, the relief sought makes clear that a writ of mandamus was properly denied.

1. Petitioner has not shown that he has a clear right to the relief he seeks or that the Army is under a clear duty to discharge him. He is seeking a discharge from military service on grounds of conscientious objection. Discharge on this ground is afforded only to those members of the armed forces who can demonstrate satisfactorily that their opposition to war is general and not particular (*Gillette* v. *United States, supra,* 401 U.S. at 437), is rooted in conscience and religion (*Welsh* v. *United States,* 398 U.S. 333), is sincerely held (cf. *Witmer* v. *United States,* 348 U.S. 375, 381), and did not become fixed until after receipt of an order of induction (*Ehlert* v. *United States,* 402 U.S. 99).

Whether or not particular individuals qualify for such a discharge turns on a delicate application of the appropriate legal standards to factual determinations that are frequently of great difficulty. Petitioner failed to convince the military that he qualified under the relevant legal criteria. Whether that determination is sustainable under the applicable "basis in fact" review standard is a question on which the courts below disagreed.[20] While that question is not now before this

[20] The district court denied petitioner relief on the merits. In its initial opinion, the court of appeals reversed that decision.

Court, we think that the sharp difference of opinion on the matter by those who have reviewed petitioner's claim indicates clearly that, contrary to his bald assertion, it cannot now be said that he has "a clear right * * * to the relief sought" (*Carter* v. *Seamans, supra,* 411 F. 2d at 773).[21]

Nor, in these circumstances, did the Army violate "a clear duty" by refusing to discharge petitioner. The decision with respect to conscientious objector qualification is not a "ministerial" function to be performed automatically by military personnel. Rather it turns on a careful evaluation of the weight and credibility of the relevant information that is submitted with a discharge application and gathered from a number of sources during the processing of the claim (See AR 135-25). Cf. *Clark* v. *Gabriel,* 393 U.S. 256, 259 (Douglas, J., concurring); *McGee* v. *United States,* 402 U.S 479, 490. The entire procedure in-

[21] Petitioner asserts at one point that "his application was processed in a manner contrary to regulations" (Br. 52). Where the military fails to follow its own regulations in processing a claim made by a serviceman and as a result there is prejudice to the serviceman, the courts have sometimes invoked mandamus to compel that the claim be reprocessed in accordance with regulations. See *Schatten* v. *United States,* 419 F. 2d 187 (C.A. 6); *Feliciano* v. *Laird,* 426 F. 2d 424 (C.A. 2); *Bluth* v. *Laird,* 435 F. 2d 1065 (C.A. 4); see also *United States ex rel. Schonbrun* v. *Commanding Officer,* 403 F. 2d 371, 375 (C.A. 2); *Hancock* v. *Laird,* 415 F. 2d 234 (C.A. 9); *Nixon* v. *Secretary of Navy,* 422 F. 2d 934 (C.A. 2). Petitioner's specific claim in this respect is not set forth, however, nor does he indicate any way in which he was prejudiced because of a procedural irregularity. Moreover, petitioner does not seek the only relief that would be available on a claim of this sort, *i.e.*, reprocessing of his claim in accordance with the regulations; instead he wants to be discharged.

volves precisely the kind of exercise of discretion and judgment that precludes relief by way of mandamus. As the Ninth Circuit observed in *Jarrett* v. *Resor, supra,* 426 F. 2d at 216–217, an assertion that the decision is erroneous on the facts presented "does not allege that * * * [the Army] failed to fulfill a plainly prescribed ministerial duty. It alleges at most that in fulfilling their duty of acting upon his request for discharge from the Army, they either abused their discretion, incorrectly found the facts, or misapplied the law * * *, [none of which supports] invoking jurisdiction under section 1361" (footnote omitted). And see *Guffanti* v. *Hershey, supra,* 296 F. Supp. at 555.

We do not agree with petitioner that the decision respecting mandamus jurisdiction turns on the applicable standard of judicial review of the administrative determination. The nature of the administrative decision under attack is determinative, not the standard of review. It does not follow from the fact that the courts can only look to see whether there exists a "basis in fact" for the military's decision that the decision itself is not of a discretionary nature. Indeed, the very reason for invoking a narrow review standard in cases dealing with claims of conscientious objection is the recognition—both by the courts and by Congress (50 U.S.C. App. 460(b)(3))—that an evaluation of such claims depends in large part on the judgment and expertness of the administrative agency assigned the responsibility of determining in the first instance whether an individual qualifies for exemp-

tion or discharge from military service. The grant or denial of conscientious objector status, grounded on agency judgment and discretion, is not a matter of fulfilling "a plainly prescribed ministerial duty" (*Jarrett v. Resor, supra*, 426 F. 2d at 216).

2. Another remedy is available to petitioner here. He may proceed by way of habeas corpus in the jurisdiction where the RCPC is located while he is not attached to any unit,[22] or in the jurisdiction where his unit is located once he has commenced active duty. It is generally recognized that in such circumstances, courts will not exercise their discretion to issue a writ of mandamus; the writ is an "extraordinary remedy" of limited availability "only in the clearest and most compelling of cases" where no other adequate remedy is available. *Carter* v. *Seamans, supra,* 411 F. 2d at 773. Such is plainly not the case here.

3. At all events, mandamus was properly rejected here because of the relief petitioner is seeking. He claims that the denial of his application for discharge is without basis in fact. If he is right, he would be entitled to be released from the Army, and, indeed, he asked for that relief in the district court (App. 15, 37). Discharge, however "is the office of habeas corpus, not mandamus" and civilian courts will not allow what is in effect a habeas corpus action under

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[22] The possible cost and inconvenience that pursuit of that remedy would entail does not render it inadequate. Compare *Carter* v. *Seamans, supra*, but see *Still* v. *Commanding Officer, supra*. Nor in this case does it seem plausible that litigating the habeas corpus action in a proper court would be significantly more costly or time consuming (see pp. 24–26, *supra*).

the guise of a suit for mandamus. *Gonzales Salcedo* v. *Lauer*, 430 F. 2d 1282, 1283 (C.A. 9). Compare *Ashe* v. *McNamara*, 355 F. 2d 277, 280 (C.A. 1); cf. *Carter* v. *Seamans*, *supra*, 411 F. 2d at 771. The court below correctly pointed out that the only remedy available under mandamus "would not afford complete relief" (App. 73).

B. REVIEW IS NOT AVAILABLE UNDER THE OTHER STATUTES ON WHICH PETITIONER RELIES

Petitioner urged in both courts below that his claims could be considered under the Administrative Procedure Act and under the general federal question jurisdiction of 28 U.S.C. 1331(a). Neither of these statutes provides an appropriate jurisdictional basis for this suit.

1. *The APA.* The Administrative Procedure Act provides for judicial review[23] only where the action complained of is "reviewable by statute" or is final action "for which there is no other adequate remedy in a court" (5 U.S.C. 704). There is no review by statute here, and another adequate remedy (a habeas corpus action in an appropriate jurisdiction) exists. By its own terms, therefore, the APA does not sanction review in the present case.

[23] Whether the APA confers subject matter jurisdiction on the district courts is not settled. While dicta in several decisions of this Court have intimated that the statute might create jurisdiction, there has been no direct holding to that effect. See *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410; see also *Brownwell* v. *Tom We Shung*, 352 U.S. 180, 185; *Rusk* v. *Cort*, 369 U.S. 367, 371–372; *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141. The courts of appeals are sharply divided.

Petitioner claims that APA review is permissible "as an alternative to habeas corpus, even when the latter remedy is unquestionably available and the more traditional mode of review" (Br. 63). The decision concerning which remedy to use, he asserts, is "primarily for the petitioner to make whenever there are hardship factors associated with one of the remedies" (Br. 64), and, since a habeas corpus suit would be burdensome to him, APA review should be allowed. In effect, his position is that there is "no other adequate remedy," and thus APA review is not barred, whenever a litigant decides it is inconvenient to proceed by habeas corpus.

There is no support for such a construction of the statute in the legislative history. Instead, it was contemplated that the courts would determine whether another remedy existed and if it was adequate. See *Administrative Procedure Act, Legislative History,* 79th Cong., 1944–46 (G.P.O. 1946), pp. 37–38; and see *id.* at pp. 213, 276–277. Of course, that is precisely what happened in the present case; the court of appeals' holding that "habeas corpus in the federal courts" where the RCPC is located is "another adequate remedy" (App. 74), though directed to another question, is equally applicable to the APA inquiry, and indicates that review based on that statute would not be appropriate.

Though the question need not be decided in this case, since APA review is not available anyway, it is our position that the statute does not create a substantive right to judicial review. See, *e.g.*, *Local 542, International Union of Operating Engineers* v. *National Labor Relations Board*, 328 F. 2d 850, 854 (C.A. 3).

Nor do the decisions of this Court in *Brownell* v. *Tom We Shung*, 352 U.S. 180, and *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, support a different result. Indeed, those cases buttress our position. For, while permitting a challenge to deportation and exclusion orders to be brought in an action under the APA seeking a declaratory judgment, the Court made it clear that review under the APA was available because the claimant did not satisfy the technical requirements for habeas corpus, since he was not in custody. In that situation, no relief could be obtained by means of habeas corpus unless the claimant subjected himself to "the odium of arrest and detention" (*Brownell* v. *Tom We Shung, supra*, 352 U.S. at 183); the Court rejected the argument that the claimant should be forced to do that in order to obtain review, and held that review under the APA would be permitted so that the habeas corpus requisites could be dispensed with. See also *Heikkila* v. *Barber*, 345 U.S. 229, 240 (Frankfurter, J., dissenting).

The question before the Court in *Tom We Shung* and *Pedreiro* was not one of mere convenience to the claimant, but rather whether the claimant could bring a habeas corpus suit at all. Since he could not without being subjected to confinement, APA review was held to be appropriate. Petitioner, on the other hand, is already in custody and he can bring a habeas corpus suit now in the proper forum without subjecting himself to any "detention" that does not already exist. In these circumstances, habeas corpus relief is an available, adequate remedy for petitioner, and review under the APA is therefore precluded.

2. *Section 1331(a)*. Section 1331(a) of Title 28 grants federal district courts "original jurisdiction of all civil actions wherein the matter in controversy exceeds * * * $10,000, * * * and arises under the Constitution, laws, or treaties of the United States." Even if this section provides a basis for subject matter jurisdiction over petitioner's claims,[24] we submit that a court should not invoke such jurisdiction to review the military's decision here.

We recognize that Section 1331(a), unlike the APA, does not limit the review permissible under it to situations where there is "no other adequate remedy in a court." Even so, we believe that the federal courts should be reluctant to entertain an action under Section 1331(a) to review an administrative determination made by the military, when there exists another available forum in which review can be had in a habeas corpus suit. Otherwise, servicemen on active duty, for example, might be able to bring an action under 1331 while at home on leave, rather than, as is required now, filing a habeas corpus case where they are stationed. See *Schlanger* v. *Seamans, supra; United States ex rel. Rudick* v. *Laird, supra; Jarrett* v. *Resor, supra.*

[24] Petitioner asserted federal question jurisdiction under Section 1331(a) and alleged that the requisite jurisdictional amount is at issue (App. 4, 34). No evidence was received on this matter, however, and neither court below discussed it. Thus, the allegations of the complaint on this subject are as yet unproven.

Thus, since deferred reservists can obtain judicial review in a habeas corpus action in the district court where the RCPC is located, other courts should exercise their discretion to decline to accept Section 1331 jurisdiction. This should be especially so where, as in the instant case, the only relief sought is a discharge from the military. Section 1331 has never served as a jurisdictional basis for relief of this sort.[25] Compare pp. 32–33, *supra,* and cases cited there. Here, the court of appeals has, in effect, merely required petitioner to use another available remedy which provides precisely the type of relief he wants, and that decision is correct. Compare *Cortright* v. *Resor,* 447 F. 2d 245, petition for a writ of certiorari pending, No. 71–814.[26]

[25] The relief which petitioner is seeking makes clear that in reality he wants to substitute APA review or declaratory relief under Section 1331(a) for the kind of suit—habeas corpus—by which such relief ordinarily must be obtained. The courts generally have insisted that where habeas corpus relief is asked for, the form of action must be habeas corpus. See *United States ex rel. Bennett* v. *State of Illinois*, 356 F. 2d 878 (C.A. 7), certiorari denied, 384 U.S. 946; *Benson* v. *State Board of Parole & Probation*, 384 F. 2d 238 (C. A. 9, certiorari denied, 391 U.S. 954.

[26] The availability of another remedy distinguishes the present case from the pre-induction review cases on which petitioner relies (Br. 65–66). Those cases involved selective sevice registrants who had not yet been inducted into the military; thus, they were not in custody, and could not test the validity of the administrative action complained of by habeas corpus. Petitioner's situation is, of course, quite different.

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the court of appeals.

Respectfully submitted.

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APPENDIX

5 U.S.C. 704 provides:

Actions reviewable.

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

28 U.S.C. 1331(a) provides:

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. 1361 provides:

Action to compel an officer of the United States to perform his duty.

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. 1391(e) provides:

> A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.
>
> The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

28 U.S.C. 2241 provides:

> *Power to grant writ.*
>
> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> (b) The Supreme Court, any justice thereof, any any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

* * * * * *

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

28 U.S.C. 2242 provides in part:

* * * * * *

If addressed to the Supreme Court, a justice thereof or a circuit judge [the application for a writ of habeas corpus] shall state the reasons for not making application to the district court of the district in which the applicant is held.

28 U.S.C. 2243 provides:

Issuance of writ; return; hearing; decision.

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the

writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

Army Regulation AR 601–25 (December 15, 1967, as amended) provides in relevant part:

CHAPTER 2—OFFICERS COMMISSIONED THROUGH THE ROTC PROGRAM—DELAY FROM ENTRY ON ACTIVE DUTY

SECTION I. GENERAL

2–1. General. a. The primary purpose of maintaining the ROTC program is to procure commissioned officers to meet the needs of the Active Army and to meet mobilization require-

ments. Officers commissioned through the ROTC program are required to perform an initial period of active duty, or if not needed on active duty, to perform 3 to 6 months of initial active duty for training (ADT) in accordance with the terms of their deferment or contractual agreement.

b. This chapter outlines the conditions whereby officers commissioned or to be commissioned through the ROTC program may be eligible to apply for one of the following categories of delay from entry on their initial tour of active duty or ADT.

(1) Category A—Post Graduate Study.

(2) Category B—Professional licensing for specialties allied to the field of medicine.

(3) Category C—Personal or community hardship.

(4) Category D—Initial/seasonal employment and licensing or certification to practice in professional field in other than field of medicine.

c. The Department of the Army may suspend the authority to grant delays or may terminate previously granted delays because of overriding military requirements.

d. The determination as to whether an officer will serve on active duty or active duty for training upon termination of delay rests with Department of the Army.

e. Officers authorized delay to pursue subjects listed in paragraph 2–11(7), (8), or (9) who are detailed to branches indicated therein and who leave school or fail to obtain the degree for which delay was granted will be ordered to active duty or ADT, as appropriate, in the branch in which they were initially commissioned unless they are transferred to a different branch of service.

★*2–2. Scope.* The provisions of this chapter apply to all officers appointed from the ROTC Program to include scholarship and non-scholarship cadets, except as indicated in *b* below.

a. Cadets who apply for delay to enroll in approved medical, dental or veterinary schools, or school of osteopathy (para 1–11*h*(3)) to pursue a course of study leading to a degree in medicine, dentistry, veterinary medicine, or osteopathy may be granted initial Category A delay under this regulation. Officers granted delay will be transferred as indicated in paragraph 2–5*b*. These officers will be considered as participants in the Medical Service Early Commissioning Program. Renewal or granting of delay for other reasons will be accomplished as set forth in AR 601–26.

b. Cadets, except scholarship cadets, who apply for Category A delay to enroll in an accredited institution (para 1–11*h*(3)(*e*)) to pursue Religion Theology, subject code 114, AR 680–29 may be granted initial delay under this regulation. Officers granted delay will be transferred as indicated in paragraph 2–5*b*. Renewal or granting of delay for other reasons will be accomplished as set forth in this chapter. Scholarship cadets are not authorized delay to pursue Religion Theology.

2–3. Responsibilities. The following commanders are responsible for the administrative actions prescribed in this chapter:

a. Area commanders described in AR 140–1 who exercise appointment authority under AR 145–1.

b. The Commanding Officer, U.S. Army Reserve Components Personnel Center, Fort Benjamin Harrison, Indianapolis, IN 46249.

SECTION II, DELAY POLICIES, CATEGORIES, ELIGIBILITY CRITERIA AND JURISDICTIONAL CONTROL

2–4. General. a. This section explains delay policies, defines delay categories, establishes eligibility criteria for delay, prescribes periods of delay and the responsibilities for jurisdictional control over officers in delay status.

b. Delay policies.

(1) An individual may be eligible for delay in reporting for initial period of active duty or ADT if he has been accepted or has reasonable evidence of acceptance for enrollment by an approved and recognized institution of higher education for graduate or professional studies, would suffer undue hardship, or for other cogent reasons authorized in this chapter.

(2) Approval of delay will be based upon the applicant's meeting the eligibility requirements or criteria prescribed for the appropriate delay category and submission of request within the established time frame.

(3) Requests for Category A, B, or D delay submitted after the time frames set forth in this chapter will not be approved, except where the individual was unable to submit his request at the proper time for reasons beyond his control. In this event, the request with complete explanation may be forwarded to CO, USARCPC for final determination.

(4) Officers authorized Category A or B delay will be assigned to USAR Control Group (Officer Active Duty Obligor) until they enter on initial tour of active duty or ACDUTRA, unless sooner separated or reassigned by proper authority.

(5) Requests for initial Category A delay must be submitted on DA Form 591 Application for Initial (Educational) Delay from Entry on Active Duty/ACDUTRA with Supple-

mental Active Duty/ACDUTRA and Reserve Participation Agreement. DA Form 591 must be accompanied by a properly executed supplemental service agreement as follows:

(*a*) DA Form 591A (Supplemental Active Duty/ACDUTRA and Reserve Participation Agreement for ROTC Participants applying for Initial (Educational) Delay from Entry on Active Duty (AR 601–25)). This agreement will be completed by all officers appointed or scheduled to be appointed from the ROTC Program who wish to apply for Category A delay, except as indicated in (*b*) and (*c*) below. Administrative instructions for completing this form and the DA Form 591 are included on the reverse of the DA Form 591A.

(*b*) DA Form 591B (Supplemental Active Duty/ACDUTRA and Reserve Participation Agreement for ROTC Participants Applying for Initial (Educational) Delay from Entry on Active Duty to pursue Course of Study leading to a degree in Medicine, Dentistry, or Veterinary Medicines (AR 601–25)). This agreement will be completed by all officers appointed or scheduled to be appointed from the ROTC Program who wish to apply for Category A delay to obtain a degree in medicine, dentistry, or veterinary medicine. Administrative instructions for completing this form and the DA Form 591 are included on the reverse of the DA Form 591B.

(*c*) DA Form 591C (Supplemental Active Duty/ACDUTRA and Reserve Participation Agreement for ROTC Participants Applying for Initial (Educational) Delay from Entry on Active Duty to Pursue Religious Studies in Preparation for the Ministry (AR 601–25)). This agreement will be completed by all officers appointed or scheduled to be appointed from the ROTC Program who wish to apply for Category A delay to obtain a degree in the

religious field preparatory to entering the ministry. Administrative instructions for completing this form and the DA Form 591 are included on the reverse of the DA Form 591C.

(6) Delay from entry on initial tour of active duty based upon financial or domestic hardship (para 1–12*a*(2)) normally will not be approved. Requests for Category C delay based upon these reasons may be approved only as exception to policy by Headquarters, Department of the Army.

(7) Officers who obtain an additional degree as a result of post graduate studies which is not consistent with the branch of service in which they initially were appointed may be reappointed or transferred to a different and more appropriate branch of service prior to entry on active duty.

2–5. Category A. ★*a. Definition.* Category A is an officer who is pursuing graduate or professional studies for the purpose of obtaining an additional academic degree. Initial Category A may be requested to pursue a course of study leading to a degree in medicine, dentistry, veterinary medicine, osteopathy, or optometry (AR 601–26); to pursue a course of study listed in the Medical Science grouping in AR 680–29 that does not lead to a degree in medicine, dentistry, veterinary medicine, osteopathy, or optometry; to pursue religious studies in preparation for the ministry; to pursue legal studies leading to a first degree in law (LLB or JD); or to pursue a masters degree in any other subject discipline. Officers who desire to apply for renewal of Category A delay in order to pursue a doctorate degree may submit an application not earlier than 6 or later than 3 months prior to completion of their original degree objective. Renewals of delays to continue studies leading to a doctorate will be limited in numbers and

fields commensurate with the needs of the Army for junior officers with doctorate degrees.

b. Jurisdictional control. Category A officers will be transferred on Special orders issued by the appropriate area commander to USAR Control Group (Officer Active Duty Obligor), USA RCPC, Fort Benjamin Harrison, Indianapolis, IN 46249. EDCSA will be established no later than the 20th of the month in which the delay becomes effective.

c. Period of delay. Applicants may be authorized delay for the periods prescribed below, provided they meet the eligibility requirements in *e* below.

(1) *Initial delay.* Period of initial delay may be for the minimum period required, but in no case will the delay exceed 1 year.

(2) *Annual renewal of delay.* Renewal of delay may be granted in increments of 1 year from the date the initial delay terminates, subject to the restrictions in (3) below.

★(3) Maximum period of delay.

(*a*) Officers granted a Category A delay to pursue a course of study leading to a degree in medicine, dentistry, veterinary medicine, osteopathy, or optometry, will be governed by the provisions of AR 601–26.

(*b*) Officers granted a Category A delay to pursue a course of study listed in the Medical Science grouping in AR 680–29 that does not lead to a degree in medicine, dentistry, veterinary medicine, osteopathy, or optometry, and those granted delay to pursue legal studies may be delayed for that period indicated in the initial application as the total period needed to complete the studies to obtain the degree objective indicated by the applicant (section II, DA Form 591), but not to exceed a total of 36 months.

(*c*) Officers granted a Category A delay to pursue religious studies in preparation for the ministry may be delayed for the period required to complete the religious studies.

(*d*) Officers granted a Category A delay to pursue a masters degree in any other subject discipline may be delayed for that period indicated in the initial application as the total period needed to complete the studies to obtain the degree objective indicated by the applicant (section II, DA Form 591), but not to exceed a total of 24 months.

★*d*. Exceptions to maximum period of delay. Exceptions to the maximum period of delay authorized in *c*(3) above may be granted only with the approval of Headquarters, Department of the Army. Requests for such exceptions must include full justification for further delay. Such justification may include, as appropriate, any communications from appropriate officials of graduate school or applicant concerning his degree program and progress, or forecasting remaining period required to complete research or presentation of thesis or dissertation. Officers who experience abnormal difficulty in completing classroom work, experiments, or research because of personal hardship, illness, experiment failure, or for similar reasons, must include substantiating documents from institution officials, family doctor, or minister as appropriate to the circumstances. Request for exceptions which will exceed a total of 12 months will include a résumé of school requirements for the degree for which the individual is enrolled. If the estimated date of completion of studies changes from previously submitted requests for delay, justification for change must be furnished. Officers who desire to apply for renewal of Category A delay in order to pursue a doctorate degree may submit an application not earlier than 6 or later than 3 months prior to completion of their original degree objective. Approval of renewal of delay for his purpose will be based on the overall needs of the service

for junior officers with a doctorate degree in the applicable subject discipline.

e. Eligibility requirements. An applicant for Category A delay must meet the following requirements:

(1) Must execute the appropriate Supplemental Active Duty/ACDUTRA Ready Reserve Participation Agreement described in paragraph 2–4*b*(5).

(2) Applicants for initial delay must—

(*a*) Be enrolled, or tentatively accepted for enrollment, as a degree student in the first regular semester or quarter commencing after the date of commissioning as an officer, or the next fall semester or quarter when the course of study is to begin only in the fall semester or quarter (e.g., medical or law school, and the applicant is a midyear appointee); and,

(*b*) Be enrolled to pursue an uninterrupted full-time course of instruction in graduate or professional studies in an approved and recognized institution of higher education for the purpose of obtaining an additional academic degree; and,

(*c*) Submit application within the time frames set forth in paragraph 2–13*a*(1)(*d*).

(3) Applicants for renewal of delay must—

(*a*) Meet the requirements outlined in (2)(*b*) above; and,

(*b*) Be satisfactorily continuing the studies at the same institution, with the same academic major professional field for which initially delayed; and,

(*c*) Submit application within the time frames set forth in paragraph 2–4*b*(5).

2–6. Category B. a. Definition. Category B is an officer who has obtained an academic degree in pharmacy or a specialty allied to medicine and must obtain professional license to perform in his branch and specialty.

b. Jurisdictional control. Category B officers will be transferred to the jurisdictional control of the CO, USARCPC in the same manner prescribed in paragraph 2–5*b*.

c. Period of delay. Delay will not exceed 1 year. Renewal of Category B delay is not authorized.

2–7. Category C. a. Definition. Category C is an officer who would suffer extreme personal or community hardship (para 2–4*b*) as a result of entry on active duty at the normally scheduled time.

b. Jurisdictional control. Category C officers will remain under the jurisdictional control of the commander approving the delay until they enter on initial tour of active duty or are screened to the Standby Reserve, unless sooner separated.

c. Period of delay.

(1) Delay is authorized for a period not to exceed 6 months when the hardship is of a temporary nature and can be alleviated within the period prescribed. Requests for renewal of delay not to exceed 6 additional months may be approved as exception to policy only at Headquarters, Department of the Army.

(2) Delay is not authorized when the hardship condition appears to be of long duration (normally in excess of 1 year) and cannot be alleviated by a temporary delay. Under these circumstances, action will be taken to screen the officer from the Ready to the Standby Reserve in accordance with AR 135–133.

2–8. Category D. a. Definition. Category D is an officer who—

(1) Desires to avail himself of the opportunity for seasonal or initial employment, or

(2) Has obtained a degree in a professional field, other than in the fields of medicine, dentistry, or veterinary medicine, and

who is required to undergo State examination for licensing or certification in his professional field.

★(3) Provides documentary evidence indicating that he is an official candidate of a recognized party in a primary election preliminary to running in a general election for the Congress of the United States. Delay to participate in elections for offices other than the Congress of the United States is not authorized.

b. Jurisdictional control. Category D officers will remain under the jurisdictional control of the commander approving the delay until they enter on active duty or are sooner separated.

★*c. Period of delay.* Category D delay may be granted in the case of *a*(1) and (2) above not to exceed 6 months from date of graduation and appointment or upon termination of current delay, whichever is the later date. Category D delay may be granted for the reason set forth in *a*(3) above for the period of time necessary to determine the outcome of the primary election and if appropriate may be extended to determine the outcome of the general election. Category D delay *will not* be authorized to permit an officer to participate in preliminary political activities for nomination as an official party candidate. Renewal of Category D delay is not authorized. Officers granted Category D delay who are elected to the Congress of the United States will be immediately transferred to USAR Control Group (Reinforcement), USAAC, St. Louis, Mo. 63132.

2–9. Category X is an officer whose Category A, B, C, and D delay has terminated but the officer will not enter on active duty with EDCSA during the same month in which his delay terminated. This is an administrative delay category to be used solely for accounting purposes.

Section III. Procedures

2–10. General. a. Officers commissioned through the ROTC programs each year normally are scheduled for their initial period of active duty or ACDUTRA during the fiscal year following their appointment. A target date of 1 March is established as the date for the issuance of letters of notification to those officers scheduled for active duty upon their graduation and commissioning in May or June of that year. Those officers not selected for active duty will be scheduled for ACDUTRA within the period outlined above.

b. To assist in planning active duty schedules and to preclude the unnecessary issurance of letters of active duty notifications, cadets planning to request delay from entry on active duty must indicate their intent as follows:

(1) Cadets who wish to apply for Category A delay will indicate their intent in Item 17, DA Form 1809 (ROTC Graduate Branch Selection Record) prepared in accordance with AR 145–133. The cadet's graduate degree objective and major field of study will be entered in Item 18 "Remarks" on the DA Form 1809.

(2) Cadets wishing to apply for Category B, C, or D delay who do not have sufficent basis at the time of submission of DA Form 1809 to submit a formal request for such delay as set forth in paragraph 2–13*a* (2) will—

(*a*) Submit, 180 days prior to date of graduation and commissioning, a letter indicating intent to apply for delay.

(*b*) Submit the letter to the appropriate area commander.

c. Information reported in Items 17 and 18, DA Form 1809 and/or contained in the letter of intent to request delay is informative only

and will be used at area command headquarters to assist in planning active duty schedules. Approval or disapproval of a request for delay will be based upon information contained on the DA Form 591 or formal letter request prepared in accordance with paragraph 2–13.

2–11. Responsibilities. a. The area commander exercising appointment authority over ROTC graduates under AR 145–1 is responsible for the actions prescribed below, until such time as the officer enters on his initial tour of active duty; or he is granted a Category A or B delay and he is transferred to the jurisdictional control of the CO, USARCPC; or he is screened to the Standby Reserve; or he is sooner separated.

(1) Maintaining control over the officer, his personnel records and for strength accountability.

(2) Processing all requests for initial delay and making final decisions thereon.

(3) Notifying applicants of decisions on requests for initial delay.

(4) Advising applicants whose initial delay has been approved of their responsibility to report any change which may influence the continuation of their delay to the area command headquarters or to the CO, USARCPC, as appropriate. The following are some of the conditions which are required to be reported:

(*a*) Failure to continue the education for which delay was granted.

(*b*) A move or transfer from the educational institution.

(*c*) Deviation from field of study.

(*d*) Change from full-time to part-time study.

(e) Unsatisfactory grades.

(*f*) Upon attaining postgraduate degree.

(*g*) When conditions for delay no longer exist.

(5) Advising applicants whose Category A delay has been approved that requests for renewal of delay must be submitted in the manner and within the time frame established in paragraph 2–13*b*(1)(*d*).

(6) Insuring that officers retained under their jurisdictional control are scheduled for active duty or ACDUTRA, as appropriate, as soon as possible under termination of delay.

(7) Publishing orders, as required, detailing officers granted initial Category A delay to pursue subjects identified by the following codes in AR 330–330 to MSC branch prior to transfer of the officer to USAR Control Group (Officer Active Duty Obligor), USARCPC:

203—Entimology
205—Parasitology, General
208—Medical Microbiology
420—Public Health Sanitary Engineer
All codes in the Medical Sciences Grouping listed in AR 330–330.

(8) Publishing orders, as required, detailing officers granted initial Category A delay to pursue study in religion—Theology, subject code 114 (AR 330–330) to Staff Specialist Branch MOS 0001 prior to transfer of the officer to USAR Control Group (Officer Active Duty Obligor), USARCPC.

(9) Publishing orders, as required, detailing officer specifically selected by The Judge Advocate General, Headquarters, Department of the Army (AR 601–107) for initial Category A delay to pursue study in General Law, subject code 599 (AR 330–330) to JAGC Branch prior to transfer of the officer to USAR Control Group (Officer Active Duty Obligor), USARCPC.

b. The CO, USARCPC is responsible for the actions set forth below until such time as officers under his jurisdictional control enter on active duty or ACDUTRA, or are screened to the Standby Reserve, or are sooner separated.

(1) Maintaining control over the officer, his Military Personnel Records Jacket, U.S. Army (DA Form 201), and for strength accountability.

(2) Furnishing officers necessary forms and instructions for applying for renewal of delay not later than 150 days prior to termination of current delay, and for making final decisions on such requests.

(3) Notifying applicants of decisions on delay requests.

(4) Advising the applicant of continued responsibility, as set forth in *a*(4) above, when delay request is approved.

(5) Insuring that officers are scheduled for active duty or ACDUTRA as soon as possible upon determination of their delay.

2–12. Reserve participation. Officers granted delay from entry on initial tour of active duty are neither required nor authorized to participate in Reserve activities, except that officers detailed Staff Specialist may participate in the education and training programs set forth in AR 135–318 for members assigned to Staff Specialist Branch (Divinity Student) MOS 0001. Applications for such training must be submitted under the provisions of AR 135–318 to CO, USARCPC, ATTN: RCPO at least 60 days prior to the training date requested.

2–13. Applications for initial delay or renewal of delay. a. Applications for initial delay. Applications must be submitted in three copies as follows:

(1) *Category A.*

(*a*) Submitted by applicant on DA Form 591. Applicant is responsible for submitting the DA Form 591 to the appropriate institution official for verification of enrollment or acceptance for enrollment.

(*b*) DA Form 591 must be accompanied by DA Form 591A, DA Form 591B, or DA Form 591C, as appropriate (para 2–4*b*(5)).

(*c*) DA Form 591 with inclosure will be submitted to the appropriate area commander.

(*d*) Application must be submitted not later than 120 days prior to the date upon which the individual is scheduled to graduate and be appointed.

(2) *Category B, C, or D.*

(*a*) Applications for Category B. C. or D delay will be submitted in letter form in accordance with the format shown in figure 2–1.

(*b*) Applications for Category C delay must be accompanied by documentary evidence substantiating hardship conditions.

★(*c*) Applications for Category D delay based upon initial employment must be accompanied by specific information from the employer. This information must include the general nature of the training program into which the individual will enter upon his employment; the beginning and ending dates of the training course or cycle for which he is scheduled; verification that the training program for which he would be scheduled with subsequent employment will not be available upon his relief from active duty; and, that completion of the training at this time will insure reemployment with the organization upon his relief from active duty. Application for Category D delay to participate in primary elections preliminary to running for election to the Congress of the United States must be accompanied by a signed statement from an authorized representative from a recognized political party that the

officer is an official party candidate. Applications for Category D delay to participate as a candidate in a primary election will be submitted in letter format substantially as indicated in figure 2–1, except paragraph 8 of the format will be modified to read as follows:

"8. I understand that if this delay is approved and I am not elected in the primary or the general election, I am responsible to notify the commander indicated above and I will be immediately available for active duty. I further understand that if I am elected to the Congress of the United States, I will be transferred immediately to USAR Control Group (Reinforcement)."

(*d*) Applications for Category B or D delay must be submitted not later than 120 days prior to the date upon which the individual is scheduled to graduate and be appointed.

(*e*) Applications for Category C delay will be submitted immediately upon the occurrence of the situation which warrants delay.

(*f*) All applications will be submitted to the appropriate area commander.

b. Applications for renewal of delay. Applications must be submitted in three copies as follows:

(1) *Category A.*

(*a*) Submitted by the officer on a form prescribed and furnished from the CO, USARCPC.

(*b*) Officer is responsible for submitting the renewal request to the appropriate institution official for verification of continued enrollment.

(*c*) Application for renewal of delay will be submitted to CO, USARCPC.

(*d*) Application for renewal of delay must be submitted not later than 120 days prior to the date upon which current delay is scheduled to terminate.

(2) *Category B.*

(*a*) Applications for renewal of Category B delay submitted as exceptions to policy will be prepared by the officer in letter format.

(*b*) Officer is responsible for including substantiating documentation necessary to support his request.

(*c*) Applications for renewal of delay will be submitted to the area commander or CO, USARCPC, whichever has jurisdictional control over the officer.

c. Disposition of delay requests. Applications for initial delay or renewal of delay on which final action has been taken will be distributed and filed as follows:

(1) Original—To be filed in applicant's Official Military Personnel File.

(2) Copy—To be filed in applicant's Military Personnel Records Jacket, U.S. Army (DA Form 201).

(3) Copy—To be returned to applicant.

2–14. Personnel records. a. Area commanders accomplishing appointment of ROTC graduates are responsible for initiating personnel records as prescribed in AR 145–10.

b. Personnel records of officers remaining under the jurisdictional control of area commanders pending entry on initial tour of active duty or ACDUTRA will be forwarded as prescribed in AR 145–1.

c. Personnel records of officers transferred to USAR Control Group (Officer Active Duty Obligor) will be forwarded as follows at the time of transfer:

(1) Official Military Personnel File will be forwarded to the U.S. Army Administration Center.

(2) Military Personnel Records Jacket, U.S. Army will be forwarded to the U.S.

Army Reserve Components Personnel Center.

_____
(Date)

SUBJECT: Application for Delay from Entry on Initial Tour of Active Duty/ACDUTRA

TO: (Commander having jurisdictional control)

1. Request that I be granted a Category ( ) B, ( ) C, or ( ) D delay in reporting for my initial tour of active duty/ACDUTRA for the reasons set forth herein.

2. My reason for requesting delay is: _____

_____

3. The following letters and/or documents are submitted to substantiate my request: _____

_____

4. Delay is requested for a period of _____ months to commence _____19____ and to terminate during _____19_____.

5. I (have) (have not) been granted previous delay. (If granted previous delay, furnish periods of delay and reasons.)

6. I (was) (will be) appointed as a commissioned officer in the USAR by _____

_____
(Area Command Headquarters)

during _____19_____.

7. My address while on delay status will be: _____

_____

Telephone: _____

8. I understand that upon termination of delay, the determination as to whether I serve on active duty or ACDUTRA rests with the Department of the Army and that my delay can be terminated at any time by Department

of the Army because of overriding military requirements.

_____
(Signature)

_____
(Name typed or printed)

_____
(Grade, branch and service No. if appointed)

_____
(Social Security Account Number)

Figure 2–1.

U.S. GOVERNMENT PRINTING OFFICE: 1972

LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-83

Supreme Court, U. S.
FILED
MAR 15 1972
MICHAEL RODAK, JR., CLERK

LT. JOHN A. STRAIT,

Petitioner,

—v.—

HON. MELVIN R. LAIRD,
Secretary of Defense, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF THE PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF THE PETITIONER

I.

Summary.

The Brief of Respondents adds nothing of substance to the *per curiam* opinion of the Court of Appeals, although their more elaborate development of the issues reveals how completely the result below is divorced from reality. They argue in a legal vacuum, devoid entirely of support in fact, practical or policy considerations, or legal and legislative history. Moreover, where such factors were addressed by petitioner in his brief, respondents have ignored them, denigrated them, and distorted them, but in no instance have they offered any countervailing rationale of their own.

II.

Facts.

Respondents' presentation of the facts is frequently misleading and erroneous, as the following examples show.

1. Respondents portray petitioner as a temporary and fortuitous resident of California (Brief of Resp. 15 and 21, n. 14), whereas in truth he had been a permanent resident of Northern California since birth (Brief of Pet. 4-5 and 21), having left the state only temporarily during three academic years to attend law school.

2. Respondents analogized petitioner to a "furloughed soldier" (Br. of Resp. 21, n. 14), relying on the false assumption that he had been "assigned" to the Yale Law School and was permitted a brief interruption in that "assignment" in order to take the California bar examination. In truth, the choice of law school was entirely the petitioner's; the only restriction being that he attend "an approved and recognized institution. . . ." AR 601-25, para. 2-3(b)(1) (see Br. of Resp. 45). Respondents have developed this false analogy in order to obscure the crucial differences between this case and *Schlanger* v. *Seamans*, 401 U.S. 487 (1971). Sgt. Schlanger, who had been assigned to a functioning military unit, was indeed a furloughed soldier. Lt. Strait, on the other hand, had only a record-keeping assignment and a nominal commanding officer (Br. of Pet. 32, n. 10). Thus, the only substantial similarity between the two cases—the physical absence of the commanding officer from the district—is obscured and distinguishable.

3. Respondents depict petitioner's conscientious objector claim as presenting a close question on the merits (Br. of Resp. 29, n. 20). Yet every Army officer who interviewed Lt. Strait found him to be sincere, and a three-judge panel of the Court of Appeals unanimously found the denial of his application factually baseless and, in part, legally erroneous (App. 66-8, 72-74).

4. Respondents state that Lt. Strait did not specifically set forth the claim that his application was not processed according to Army regulations (Br. of Resp. 30, n. 21). The statement is in error; the specific irregularities are described in the Amended Petition (App. 36) and in the Brief of Petitioner, p. 7, n. 3.[1]

III.

Habeas corpus.

Respondents argue that the District Court did not have habeas corpus jurisdiction on the sole ground that the Army officer designated as petitioner's commanding officer was not physically present in the district where the petition was filed. To deny a habeas petitioner access to court

[1] Lt. Strait alleged that much of the record upon which the Army relied was created without his knowledge and therefore without his having an opportunity to respond to highly prejudicial and inaccurate information contained therein (App. 36). He has not fully developed the substance of these allegations here since that question is not before this Court. In the present posture of the case, i.e., on respondents' motion to dismiss, those allegations must be admitted as true. E.g., *Walker Process Equip. Inc.* v. *Food Mach. & Chem. Corp.*, 382 U.S. 172, 174-175 (1965). In any event these same allegations of irregularity have recently been found meritorious by the Second Circuit. *Friedberg* v. *Resor*, —— F.2d ——, 5 SSLR 3028 (2d Cir. No. 71-1573, decided 12-29-71). See also, *Crotty* v. *Kelly*, 443 F.2d 214 (1st Cir. 1971).

on such a slender thread would seem to require potent support in policy, practical needs, or legislative and legal history. There is none.

A. *No Policy-Interests Are Advanced by the Result Urged by Respondents.*

Respondents urge that the commanding officer must be physically present because "effective relief depends upon the court's ability to compel the custodian to obey its mandate . . ." (Br. of Resp. 18-9). Nevertheless, respondents do not say why, in a purely federal, habeas corpus proceeding, such *physical* presence is necessary when physical presence was never relied upon to establish and maintain the bonds sought to be broken; especially when the custodian has established substantial contact with the petitioner in the district.

Indeed, respondents concede that Lt. Strait was "'in custody' within the district where [he] reside[d] pursuant to Army authorization" (Br. of Resp. 11), and that he "would be as much 'in custody' where his RCPC commander is, . . . as he would be in California when located there" (*Id.* at 23). But they say he cannot obtain judicial release from this custody unless he leaves the very place where he is restrained and establishes a new and different residence (even though the new residence need be but fleeting). This "Mexican divorce" approach to the Great Writ demeans its value and exalts form over substance without serving any legitimate policy function.

It is far more appropriate to avoid such fabricated *physical presence* requirements and to honor reality by relying upon traditional indicia of *jurisdictional presence* (Br. of

Pet. 31-2) in unattached reservist cases. Many courts have adopted this approach. *Arlen* v. *Laird*, 451 F.2d 684 (2d Cir. 1971); *Strieb* v. *Gasiewicz*, 3 SSLR 3729 (7th Cir. 1970); *United States ex rel. Armstrong* v. *Wheeler*, 321 F. Supp. 471 (E.D. Pa. 1970); *Donigian* v. *Laird*, 308 F. Supp. 449 (D. Md. 1969); *Nason* v. *Secretary of the Army*, 304 F. Supp. 422 (D. Mass. 1969); *Decker* v. *Wheeler*, 3 SSLR 3286 (D. Minn. 1970).

Respondents contend that jurisdictional presence through contacts is not adequate because the writ cannot be effected outside the issuing court's jurisdiction (Br. of Resp. 20, n. 13), but, again, they fail to say why this should be so. Moreover, they have overlooked the existence of 28 U.S.C. §1391(e), which at a minimum can be used to *effect* service of process (where the respondents are federal officers) in aid of habeas corpus jurisdiction otherwise found to exist.[2] *Smith* v. *Campbell*, 450 F.2d 439 (9th Cir. 1971); cf., *Ex Parte Endo*, 323 U.S. 283 (1944).

B. *Practical Considerations.*

Petitioner described the hardships that non-unit reservists would encounter if forced to seek judicial review of denials of discharge either in the district where the Reserve Centers are located or after they are on active duty (Br. of Pet. 41-6), and contended that such a harsh result ad-

[2] No explanation is offered why the physical congruity of a United States District Judge and a federal custodial officer is necessary to insure, or will even enhance, obedience to the writ. Undoubtedly proper and adequate service of process will encourage obedience, but Congress has said that 28 U.S.C. §1391(e) may serve this purpose in civil cases. Nevertheless initially finding jurisdictional presence independent of §1391(e) as was done here may be required to prevent an indirect expansion of the scope of 28 U.S.C. §2241 (Br. of Pet. 33).

vances no interest of the government (*Id.* 46-51). Respondents suggest that these hardship contentions are overblown (Br. of Resp. 24-5). (By their silence, however, they apparently concede that a contrary rule would have no detrimental impact on the government.)[3]

With respect to financial considerations alone, the government's brief shows a lack of sensitivity to the burdens which litigation imposes upon the average citizen. Respondents suggest that petitioner could invoke the habeas corpus jurisdiction of the district court in St. Louis, Missouri, by flying there "in a matter of hours" (Br. of Resp. 24), and that his "counsel could of course travel to the RCPC as easily as petitioner" (*Id.* at 25). They apparently do not realize that the added costs thus incurred (air fare, hotel and other travel expenses, per diem charges by counsel for each day away from his office, the expenses of retaining additional local counsel in Missouri) would put habeas corpus actions financially out of the reach of most citizens.

If a reservist cannot bear these costs, respondents contend, he can simply report for active duty at Army expense and then file his petition (Br. of Resp. 24). But, this alternative is not available to a reservist whose active duty will not commence until some future and perhaps undetermined date. E.g., *Nason* v. *Secretary of the Army*, *supra*. Such a non-affluent, delayed active-duty reservist would thus be

[3] The only argument even tenuously advanced is that the rule urged by petitioner will create jurisdiction in numerous situations for "all servicemen" (Br. of Resp. 14, n. 10). No reason is offered why such a result should be disfavored; in any event the statement is an exaggeration. Lt. Strait seeks only a rule applicable to unattached, inactive reservists—a result further controlled by rules relating to venue, *forum non conveniens*, and interlocutory relief (Br. of Pet. 47-51).

relegated to a litigative limbo. And even a reservist with an immediate activation date still faces a serious problem regarding the assistance of counsel (Br. of Pet. 42-3). Must he seek and retain entirely new and unfamiliar counsel upon reporting for active duty, or will he pay to transport his present counsel across country (again at great cost)?

Nor is it true that whether petitioner must go on active duty is not in dispute (Br. of Resp. 24, n. 18). The Second Circuit answered that contention in *Arlen* v. *Laird, supra* at 687, where it rejected the notion that "the petitioner [must] leave his home and his work in order to contest the power of the Army to force him to do so." See also, *Scaggs* v. *Larsen,* 396 U.S. 1206 (1969) [Douglas, J. in chambers]; *Berman* v. *Resor,* 302 F. Supp. 1200, 1202 (N.D. Cal. 1969). At least one paramount feature of the writ of habeas corpus is its prompt availability, and this is as important in testing military restraints as in any other context. *Parisi* v. *Davidson,* —— U.S. ——, 40 U.S. Law Week 4177 (decided 2-23-72).

C. *The Potential for Serious Concentration of Cases Exists.*

Respondents cite figures and claim that the District Court where the Reserve Center is located will not become overburdened (Br. of Resp. 26-7). But they cited only conscientious objector discharge statistics for 1971, and did not offer figures for other years or for the other categories of administrative discharge which a reservist could seek.[4]

[4] There are reported habeas corpus actions by unsuccessful reserve discharge applicants in other categories, of which the following are examples:

(*continued on following page*)

The Amici Curiae inform us that there are approximately 2,000,000 reserve servicemen assigned to the U.S. Army Reserve Components Personnel and Administration Center at St. Louis. Petitioner does not begin to suggest that even a significant number of these individuals will seek administrative discharge, or even judicial vindication of a denial of such a request. Nevertheless, post-discharge-denial habeas petitions by even a small percentage of those so assigned could easily engulf a single district court. Thus, the important *fact* is that the rule urged by respondents would create a situation of potential seriousness.

D. *Legislative and Legal History.*

The bizarre solution offered by respondents to Lt. Strait's dilemma—that he fly to St. Louis and establish a scintilla of custody there—runs exactly contrary to the paramount purpose behind the territorial jurisdiction criteria incorporated into the habeas corpus statute by Congress, namely, that petitioners be required to bring such actions where they are actually physically located in order to avoid their transportation about the country (Br. of Pet. 25-6). The very concept of itinerant habeas petitioners, travelling about the country in an effort to establish "complete" custody, defies all notions associated with the Great Writ. Indeed, the "body" referred to in respondents' view of

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1. Medical—*Patterson* v. *Stâncliff*, 4 SSLR 3644 (D. Vt. 1971).
2. Individual hardship—*United States ex rel. Schonbrun* v. *Commanding Officer*, 403 F.2d 371 (2d Cir. 1968).
3. Community hardship—*United States ex rel. Hutcheson* v. *Hoffman*, 439 F.2d 821 (5th Cir. 1971).
4. Minister of religion and/or divinity student—*Barr* v. *Weise*, 293 F. Supp. 7 (S.D.N.Y. 1968), *modified*, 412 F.2d 338 (2d Cir. 1969).

habeas corpus is now apparently the body of the custodian, the petitioner having become somewhat irrelevant.

Respondents have cited no legislative or judicial history to support their theory that the presence of the custodian is a subject matter jurisdiction requirement. Their attempt now to cast *Schlanger* v. *Seamans, supra,* as a new departure (rather than a restatement of personal jurisdiction concepts) is at odds with their own contentions in that case (see Br. of Pet. 24).

In short, respondents' arguments are devoid of any foundation in the facts of this case, practical realities of a more general nature, policy considerations, or legislative history. This Court should not adopt a rule that, without serving any countervailing interest, will impose serious hardships on a significant class of habeas petitioners and thus contract the availability of the Great Writ.

IV.

Mandamus.

Petitioner's brief challenged the Ninth Circuit's view of mandamus jurisdiction under 28 U.S.C. §1361, as stated in *Jarrett* v. *Resor,* 426 F.2d 213 (9th Cir. 1970). In reply, respondents defend the Ninth Circuit's position, relying heavily, as their authority, on—*Jarrett* v. *Resor* (*Id.* 28, 31 and 32). Such reasoning typifies the strength of respondents' contentions.

1. Trotting out meaningless, "ministerial-discretionary" terminology, respondents claim that the Army's decision herein is unreviewable in mandamus because it was "discretionary." But, as Chief Justice John Marshall noted, discretionary acts are "in their nature political," where

the officer or agency has acted as "the mere organ of executive will. . . ." *Marbury* v. *Madison,* 1 Cranch (5 U.S.) 137, 170 (1803). Surely, respondents do not mean that the Army's decision here was a "political" one. Rather, they must concede that the decision here is an action where the Secretary of the Army (or his designee) "is not placed under the particular direction of the president, and the performance of which the president cannot lawfully forbid. . . ." *Id.* This has remained the basic approach to executive discretion over the years and was reaffirmed as recently as last Term. See *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 410-13 (1971); Brief of Pet. 54-57.

Respondents attempt to include in the scope of "discretion" any actions that require the weighing of facts and application of law to those facts is inconsistent with that understanding The mere fact that an administrative determination is complex or difficult does not render it "discretionary" and therefore insulated from judicial review under mandamus, *Roberts* v. *United States,* 176 U.S. 221, 231 (1900); *Carey* v. *Local Board No. 2,* 297 F. Supp. 252, 254-5 (D. Conn.), *aff'd,* 412 F.2d 71 (2d Cir. 1969); although the fact that the process does require some extensive fact-finding and law-applying may make it more easily supportable on the merits, especially under the narrow, "basis-in-fact" test.[5] But this buttresses the conclusion that the

[5] It is not true as suggested (Br. of Resp. 31) that the basis-in-fact test was developed in conscientious objector cases because of special deference to the expertise of the agency. That standard applies equally to less subjective determinations of draft boards and their military counterparts. It was primarily invoked to make the system of obtaining military manpower more efficient by reducing the scope of judicial review. See, *Estep* v. *United States,* 327 U.S. 114, 128 and 133 (1945) [Murphy, J., and Rutledge, J., concurring].

scope of review here sought is in the nature of mandamus, for when even the relatively stringent basis-in-fact test cannot be met, then the military authorities, as "a mere perfunctory or ministerial matter" should have granted the discharge application. *Still* v. *Commanding Officer*, 334 F. Supp. 617, 622 (N.D. Ala. 1971).

2. Respondents' argument fails for another reason—the Army's decision was not a "close" result where the facts were carefully weighed and the law diligently applied. The record reveals that Lt. Strait in fact clearly met each of the required criteria for discharge and that the Army's determination was both legally erroneous (App. 66), see, *Rosengart* v. *Laird*, —— U.S. ——, 40 U.S. Law Week 3393 (decided 2-22-72); *Clay* v. *United States*, 403 U.S. 698 (1971), and factually baseless (App. 68).[6] The Army owed Lt. Strait a "clear duty" to decide his claim according to the law and the facts, a duty it did not perform.

3. Finally, respondents advance two technical objections to mandamus jurisdiction: (a) that the district court had discretion not to proceed in mandamus because another remedy existed and (b) that Lt. Strait did not seek the kind of relief that can be afforded in mandamus.

a. Even if a district court may discretionarily refuse to proceed in mandamus because another remedy exists, it was improper for the Court of Appeals to exercise that discretion on behalf of the district judge, particularly since the Court of Appeals did *not* find that it would have been an abuse of discretion for the district court to have pro-

[6] While the district judge disagreed, he entered no findings of fact or conclusions of law to support his order, and he was unanimously reversed on that question by the Court of Appeals.

ceeded in mandamus (App. 76). More importantly, the district court does not have such discretion. The court *must* proceed in mandamus if petitioner "has no other specific legal remedy . . ." *Marbury* v. *Madison, supra* at 169, but where a specific legal remedy (which thus becomes the exclusive remedy) exists, the court must likewise refrain. *Carter* v. *Seamans,* 411 F.2d 767, 773 (5th Cir. 1969). Here, habeas corpus is neither a specific, statutory remedy nor a legal one; it is an equitable, non-statutory remedy that stands on the same footing as mandamus. Accordingly, *Carter* v. *Seamans, supra,* relied on by both the court below and respondents, is inapposite.

b. Petitioner not only sought an order discharging him from custody; he also requested declaratory and injunctive relief (App. 37)—remedies quite consistent with his claims of procedural irregularity. But, respondents contend, since the district court could not discharge Lt. Strait from custody pursuant to its mandamus power, it should grant no relief at all (Br. of Resp. 32). Nevertheless, the court certainly has ample power under the All Writs Statute (28 U.S.C. §1651), the Declaratory Judgment Act (28 U.S.C. §§2201-2), and its inherent injunctive authority to fashion a more than adequate remedy that would sever Lt. Strait's legal obligations to the Army. Cf., *Massachusetts* v. *Laird,* 400 U.S. 886, 899 (1970) (Douglas, J., dissenting).

V.

Other remedies.

With regard to jurisdiction under the Administrative Procedure Act, the respondents' quarrel is more with the decisions of this Court than with the petitioner.

As to federal question jurisdiction, respondents concede that it provides an additional basis for jurisdiction, but they attempt to fabricate out of whole cloth a doctrine of discretionary federal question jurisdiction (Br. of Resp. 37). It is revealed as the sham it is by the complete absence of any cited authority supporting the novel suggestion.[7]

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[7] The authorities cited at p. 37, n. 25, *id.*, are inapposite. They merely restate the rule that the Declaratory Judgment Act is not an independent jurisdictional statute. They have nothing to do with 28 U.S.C. §1331(a).

CONCLUSION

For the reasons stated herein and in Petitioner's Opening Brief, Lt. Strait urges that the judgment below be reversed, and the cause remanded for re-instatement of the judgment of February 17, 1971.

March, 1972

Respectfully submitted,

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STRAIT v. LAIRD, SECRETARY OF DEFENSE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 71-83. Argued March 22, 1972—Decided May 22, 1972

District Court for the Northern District of California has jurisdiction under 28 U. S. C. § 2241 (c) (1) to hear and determine the habeas corpus application of petitioner, who was on unattached, inactive Army reserve duty while domiciled in California, where military authorities processed his application for conscientious objector discharge, though he was under the nominal command of the commanding officer of the Reserve Officer Components Personnel Center in Indiana. *Schlanger* v. *Seamans*, 401 U. S. 487, distinguished. Pp. 342-346.

445 F. 2d 843, reversed.

DOUGLAS, J., delivered the opinion of the Court, in which STEWART WHITE, MARSHALL, and BLACKMUN, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in Part I of which BURGER, C. J., and BRENNAN and POWELL, JJ., joined, *post*, p. 346.

John T. Hansen argued the cause for petitioner. With him on the briefs were *Melvin L. Wulf*, *Michael N. Pollet*, and *Paul Halvonik*.

Solicitor General Griswold argued the cause for respondents. With him on the brief were *Assistant Attorney General Mardian*, *Wm. Terry Bray*, and *Robert L. Keuch*.

Stanley F. Farrar filed a brief for the Central Committee for Conscientious Objectors et al. as *amici curiae* urging reversal.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner is an Army Reserve officer not on active duty. His active-duty obligations were deferred while

he went to law school after graduating from college. During the period of deferment and at the time this action was commenced, his military records were kept at Fort Benjamin Harrison, Indiana. His nominal commanding officer was the Commanding Officer of the Reserve Officer Components Personnel Center at Fort Benjamin Harrison. Petitioner was, however, at all times domiciled in California and was never in Indiana or assigned there. On finishing law school he took the California Bar examination and on March 5, 1970, he was ordered to report for active duty at Fort Gordon, Georgia, beginning April 13, 1970. Before that time, however, he had filed an application for discharge as a conscientious objector. That application was processed at Fort Ord, California, where hearings were held. Fort Ord recommended his discharge and review of that recommendation was had in Indiana. The result was disapproval of the application.

Petitioner thereupon filed a petition for writ of habeas corpus in California. The District Court denied a motion to dismiss, holding that it had jurisdiction (3 S. S. L. R. 3152), but ruled against petitioner on the merits. On appeal the Court of Appeals agreed with the District Court as to jurisdiction but disagreed with it on the merits and granted the writ. 3 S. S. L. R. 3784. Shortly thereafter our decision in *Schlanger* v. *Seamans*, 401 U. S. 487, was announced. Thereupon the Court of Appeals granted a petition for rehearing and dismissed the action, holding that the District Court had no jurisdiction under the habeas corpus statutes. 445 F. 2d 843. The case is here on a petition for certiorari, which we granted. We reverse the judgment below.

In *Schlanger* the serviceman—on active duty in the Air Force—was studying in Arizona on assignment from Ohio. There was no officer in Arizona who was his

custodian or one in his chain of command, or one to whom he was to report. While the Habeas Corpus Act extends to those "in custody under or by color of the authority of the United States," 28 U. S. C. § 2241 (c)(1), we held in *Schlanger* that the presence of the "custodian" within the territorial jurisdiction of the District Court was a *sine qua non*. In *Schlanger* the only "custodian" of the serviceman was in Moody AFB, Georgia. While there were army officers in Arizona, there were none to whom the serviceman was reporting and none who were supervising his work there, though he was on active duty. Moreover, the serviceman in that case was in Arizona only temporarily for an educational project.

In the present case California is Strait's home. He was commissioned in California. Up to the controversy in the present case he was on reserve duty, never on active duty, and while he had gone east for graduate work in law, California had always been his home. Fort Ord in California was where his application for conscientious objector discharge was processed and where hearings were held. It was in California where he had had his only meaningful contact with the Army; and his superiors there recommended his discharge as a conscientious objector.

Thus, the contention in the dissent that we "abandon *Schlanger*" by the approach we take today is incorrect. Sergeant Schlanger was on permissive temporary duty. While his stay in Arizona was thus not charged to his leave time, it was primarily for his own benefit,[1] he paid

[1] At the time Sergeant Schlanger received his assignment, Air Force Regulation 35-26 (Mar. 6, 1968) defined "permissive temporary duty" as "duty of a quasi-official nature performed at other than the permanent duty station, without costs to the Government for per diem and travel." So defined, primary difference between "leave" and "permissive temporary duty" appears to be that

his own expenses, and he was as much on his own as any serviceman on leave. We held in *Schlanger* that, while an active-duty serviceman in such a status might be in military "custody," see *Donigian* v. *Laird*, 308 F. Supp. 449 (Md. 1969), his custodian may not be deemed present wherever the serviceman has persuaded the service to let him go. The jurisdictional defect in *Schlanger*, however, was not merely the physical absence of the Commander of Moody AFB from the District of Arizona, but the total lack of formal contacts between Schlanger and the military in that district.

Strait's situation is far different. His nominal custodian, unlike Schlanger's, has enlisted the aid and directed the activities of armed forces personnel in California in his dealings with Strait. Indeed, in the course of Strait's enlistment, virtually every face-to-face contact between him and the military has taken place in California. In the face of this record, to say that Strait's custodian is amenable to process only in Indiana—or wherever the Army chooses to locate its recordkeeping center, see n. 3, *infra*—would be to exalt fiction over reality.

In a closely parallel case the Court of Appeals for the Second Circuit held that an unattached reserve officer who lived in New York and whose application for discharge as a conscientious objector was processed in New York could properly file for habeas corpus in New York, even though the commanding officer of the reservists was in Fort Benjamin Harrison, Indiana. *Arlen* v. *Laird*, 451 F. 2d 684. The court held that the only contacts the serviceman had had with his commanding officer were through the officers he dealt with in New York. Those contacts, it concluded, were sufficient to give the

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the latter status requires the serviceman to convince the military that his proposed activity, while away from his permanent duty station, would be of some direct or indirect benefit to the service.

commanding officer "presence" in New York. It concluded:

> "Quite unlike a commanding officer who is responsible for the day to day control of his subordinates, the commanding officer of the Center is the head of a basically administrative organization that merely keeps the records of unattached reservists. To give the commanding officer of the Center 'custody' of the thousands of reservists throughout the United States and to hold at the same time that the commanding officer is present for *habeas corpus* purposes only within one small geographical area is to ignore reality." *Id.*, at 687.

We agree with that view. Strait's commanding officer is "present" in California through the officers in the hierarchy of the command who processed this serviceman's application for discharge.[2] To require him to go to Indiana where he never has been or assigned to be would entail needless expense and inconvenience. It "would result in a concentration of similar cases in the district in which the Reserve Officer Components Personnel Center is located." *Donigian* v. *Laird*, 308 F. Supp., at 453.[3] The concepts of "custody" and "custodian" are

[2] That such "presence" may suffice for personal jurisdiction is well settled, *McGee* v. *Int'l Life Ins. Co.*, 355 U. S. 220; *Int'l Shoe Co.* v. *Washington*, 326 U. S. 310, and the concept is also not a novel one as regards habeas corpus jurisdiction. In *Ex parte Endo*, 323 U. S. 283, 307, we said that habeas corpus may issue "if a respondent who has custody of the prisoner is within reach of the court's process . . . ." Strait's commanding officer is "present" in California through his contacts in that State; he is therefore "within reach" of the federal court in which Strait filed his petition. See *Donigian* v. *Laird*, 308 F. Supp. 449, 453; cf. *United States ex rel. Armstrong* v. *Wheeler*, 321 F. Supp. 471, 475.

[3] This concentration would be exacerbated in the extreme by the fact that the Reserve Components Personnel Center at Fort Benjamin Harrison, Indiana, has now been moved to St. Louis,

sufficiently broad to allow us to say that the commanding officer in Indiana, operating through officers in California in processing petitioner's claim, is in California for the limited purposes of habeas corpus jurisdiction.

We intimate no opinion on the merits of the controversy—whether petitioner is entitled to a discharge or whether by denying that relief the Army has acted in accordance with the prescribed procedures. We hold only that there is jurisdiction under 28 U. S. C. § 2241 (c)(1) for consideration of this habeas corpus petition and for decision on the merits.

Reversed.

MR. JUSTICE REHNQUIST, dissenting.

The Court today emasculates *Schlanger* v. *Seamans*, 401 U. S. 487 (1971), by permitting habeas corpus when the custodian against whom the writ must run is not within the forum judicial district. It stretches the concept of custody beyond anything contained in any of our previous decisions, and permits the federal courts through habeas corpus to exercise broader review of military administration than has ever been permitted. I therefore dissent.

I

The facts of this case are indistinguishable in any material respect from *Schlanger* v. *Seamans*, *supra*. Petitioner was assigned to the Reserve Officer Components Personnel Center at Fort Benjamin Harrison, Indiana. His dealings with the Army consisted of several requests for delay in commencing active duty, all of which were addressed to and granted by his com-

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Missouri, and has been there merged into the United States Army Reserve Components Personnel and Administration Center (RCPAC). RCPAC has recordkeeping and nominal administrative responsibility for approximately 2,000,000 servicemen, all unattached, inactive reservists such as petitioner.

manding officer at Fort Benjamin Harrison, and an application for discharge as a conscientious objector, which was also submitted to the Indiana command. Although petitioner was interviewed by a chaplain, psychiatrist, and another Army officer at Fort Ord, California, each of whom made recommendations about petitioner's application, petitioner was not subject to military orders from any command in California nor did any California command rule upon his application. The preliminary processing accomplished by the interviews was forwarded to petitioner's commanding officer at Fort Benjamin Harrison, who convened a review board to pass upon the application. Following the board's recommendation, petitioner's commanding officer denied the requested discharge. Nothing in the record before us indicates that petitioner has ever been subject to the orders of any Army officer or command in California. What little control the Army imposed upon petitioner emanated from his commanding officer in Indiana.

Only last Term, this Court held in *Schlanger*, that a district court has jurisdiction to issue a writ of habeas corpus under 28 U. S. C. § 2241, to a military custodian, only where a commanding officer or other custodian in the chain of command is found within the judicial district. Because Schlanger had been assigned to a command in Georgia, and no official in Arizona controlled his activities, the District Court of Arizona had no habeas jurisdiction. Attempting to reconcile *Schlanger* with this case, the Court today says:

> "In *Schlanger* the only 'custodian' of the serviceman was in Moody AFB, Georgia. While there were army officers in Arizona, there were none to whom the serviceman was reporting and none who were supervising his work there, though he was on active duty. Moreover, the serviceman in

that case was in Arizona only temporarily for an educational project.

"In the present case California is Strait's home. He was commissioned in California. Up to the controversy in the present case he was on reserve duty, never on active duty, and while he had gone east for graduate work in law, California had always been his home. Fort Ord in California was where he processed his application for conscientious objector discharge and where hearings were held. It was in California where he had had his only meaningful contact with the Army; and his superiors there recommended his discharge as a conscientious objector." *Ante*, at 343.

But there were no officers in California to whom this petitioner was reporting, and "none who were supervising his work there." His control by the Army has heretofore consisted only of requests for delayed commencement of active duty, and for discharge. All such requests were addressed to and decided by his commanding officer in Indiana. His "meaningful contact" with the Army was not in California, but Indiana. His interviews with staff officers at Fort Ord neither constituted them "superiors" nor did it bring them within petitioner's chain of command. No officer or command in California had authority to provide the relief requested by petitioner. Under the principle enunciated in *Schlanger*, the Northern District of California lacked jurisdiction to issue habeas corpus for want of a custodian within the district. Emphasizing that petitioner brought this habeas corpus suit in the district where his home is cannot cure that defect, cf. *Rudick* v. *Laird*, 412 F. 2d 16 (CA2 1969). We deal not with the provisions of a venue statute, but with the established requirement that the petitioner's custodian be within the

district. Petitioner's presence in his home State to take the bar examination, after a three-year absence while attending law school, affords him no more support than did Schlanger's presence in Arizona.

The Court substitutes the approach of *Arlen* v. *Laird*, 451 F. 2d 684 (CA2 1971), for its *Schlanger* rule. *Arlen*, incorrectly concluding that *Schlanger* reserved the question presented here,[1] held that the type of contacts between the commanding officer and a reservist that have been found to support state jurisdiction over nonresidents under cases like *McGee* v. *Int'l Life Ins. Co.*, 355 U. S. 220 (1957), and *Int'l Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), would also suffice for habeas jurisdiction. To adopt *Arlen* is to abandon *Schlanger*. But the reasons given by the Second Circuit in *Arlen* do not support a result in that case different from *Schlanger*. *Arlen* noted that Government counsel were adequately available in any judicial district, and the records could be forwarded from petitioner's command to the forum district. The same could have been said of *Schlanger*. Moreover, the Government can assert that Indiana would be the appropriate forum, for the actions of which petitioner complains were taken by the commanding officer and his advisory board at Fort Benjamin Harrison and presumably the proper witnesses for this litigation were there. These factors would be appropriately considered in a determination as to venue or *forum non conveniens* but they are not a substitute for the actual presence of a custodian, which *Schlanger* held was required by statute.

[1] "The Supreme Court reserved decision on this precise question, 401 U. S., at 489, 491 n. 5 . . . and cited, apparently with approval, Donigian v. Laird, 308 F. Supp. 449 (D. Md. 1969)," 451 F. 2d, at 686. But the cited portions of *Schlanger* dealt only with the question of custody, and not with the separate jurisdictional requirement that a custodian be present within the judicial district.

II

While I am satisfied that the Ninth Circuit correctly applied *Schlanger* and ordered dismissal of the habeas corpus petition for want of a custodian within the district, the analysis of the Court in reaching the opposite conclusion highlights what is for me the more substantial issue of whether petitioner was in the custody of anyone.

The Court believes that petitioner's commanding officer was merely a record center, and says that the realistic approach is to rule that such a record center is present in all States where there are reservists over whom it has custody. I believe that where the control exercised over petitioner is so attenuated as to require the contacts between himself and his commanding officer to be weighed for a jurisdictional nexus, the problem is not where the custodian may be found, but whether the petitioner is in custody at all. The most realistic approach is to recognize that custody as a prerequisite for habeas corpus simply does not exist for an unattached reservist who is under virtually no restraints upon where he may live, work, or study, and whose only connection with the Army is a future obligation to enter active duty. This Court has recognized that a person on active duty with the armed forces is sufficiently "in custody" to invoke habeas corpus. *Eagles* v. *Samuels*, 329 U. S. 304 (1946); *Schlanger* v. *Seamans*, *supra*; *Parisi* v. *Davidson*, 405 U. S. 34 (1972). Aside from ruling that release from active to inactive duty does not moot a habeas proceeding,[2] however, the Court has never considered whether a future obligation to commence Army duty is a sufficiently severe restraint to support habeas jurisdiction.

Habeas corpus is a powerful remedy to be wielded promptly in cases where restrictions on individual liberty

[2] *Gillette* v. *United States*, 401 U. S. 437, 440 n. 2 (1971).

are substantial. The requirement of custody is a primary parameter for preserving the great writ for appropriate situations. It is undefined by statute, but depends upon the severity of restraint upon liberty that is involved. *Jones v. Cunningham*, 371 U. S. 236 (1963); Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1073 (1970).

Notions of custody have changed over the years. In 1885, this Court held that a military order restricting a serviceman to the confines of the District of Columbia did not place him in custody. *Wales* v. *Whitney*, 114 U. S. 564 (1885). Recent decisions dealing with nonmilitary petitioners have admittedly broadened the concept of custody. *Jones* v. *Cunningham*, *supra*; *Carafas* v. *LaVallee*, 391 U. S. 234 (1968). *Jones* held that a parolee was in custody because he was restricted to the community of his parole, needed special permission to undertake some activities such as driving an auto, and was subject to prompt reincarceration with only administrative proceedings if he violated parole conditions. In *Carafas* a convicted felon who was neither in prison nor on parole was held to be "in custody" because the disabilities of his conviction prevented him from engaging in many types of businesses, voting at any state election, or serving as a labor official or juror.

But even if this nonmilitary standard were to be applied to petitioner, it is difficult to place him in that class of persons laboring under substantial restraints for whom habeas corpus is reserved. By his own admission, petitioner "has not been subject to military orders, reserve meetings or summer active duty." From all that appears in the record, petitioner is free to go anywhere he desires or to engage in any activity he chooses, and is not subject to any Army control until he commences active duty. His situation is indistinguishable from a prospective inductee, who is not considered to

be in custody for habeas corpus purposes until after induction. *DeRozario* v. *Commanding Officer*, 390 F. 2d 532 (CA9 1967). Neither precedent nor the *raison d'être* of the writ sanctions the result reached in this case. Petitioner would be in "custody" only when he reported to Fort Gordon, Georgia, pursuant to his orders, and only then would he be entitled to bring habeas corpus.

III

There is yet another shortcoming in petitioner's claim to habeas corpus.

Unlike those who are covered by the Military Selective Service Act, 50 U. S. C. App. § 451 *et seq.*, there is no statutory right afforded petitioner and other voluntary members of the armed services to be discharged as conscientious objectors. Under Department of Defense Directive 1300.6 the armed forces will approve administrative discharges on a discretionary basis. By assuming that habeas corpus review of the exercise of this discretion is proper, the Court and the courts of appeals applying the same standards of review called for under § 6 (j) of the Military Selective Service Act, 81 Stat. 104, as amended, 85 Stat. 351,[3] have failed to recognize well-established limitations upon habeas corpus in military cases, and the also well-established re-

[3] Most of the circuits have permitted habeas corpus review of an application for discharge under DOD 1300.6. *E. g.*, *United States ex rel. Sheldon* v. *O'Malley*, 137 U. S. App. D. C. 141, 420 F. 2d 1344 (1969); *Bates* v. *Commander*, 413 F. 2d 475 (CA1 1969); *Hammond* v. *Lenfest*, 398 F. 2d 705 (CA2 1968); *Brown* v. *McNamara*, 387 F. 2d 150 (CA3 1967); *United States ex rel. Brooks* v. *Clifford*, 409 F. 2d 700 (CA4 1969); *Brown* v. *Resor*, 407 F. 2d 281 (CA5 1969); *Packard* v. *Rollins*, 422 F. 2d 525 (CA8 1970); *Sertic* v. *Laird*, 418 F. 2d 915 (CA9 1969).

This Court has considered petitions for habeas corpus under DOD 1300.6 in *Craycroft* v. *Ferrall*, 397 U. S. 335 (1970), and *Gillette* v. *United States*, 401 U. S. 437 (1971).

striction upon reviewing the administration of the armed services.

A district court has power to grant a writ of habeas corpus only where a prisoner "is in custody in violation of the Constitution or laws or treaties of the United States" [4] or "is in custody under or by color of the authority of the United States." [5] Petitioner has voluntarily assumed a reserve officer's commission and there is no indication from the record that his present obligation violates either the Constitution or laws of the United States. Nor is he restrained under any color of authority of the United States that cannot be traced to legitimate statutory authorization. Our inquiry should go no further.

In *Burns* v. *Wilson*, 346 U. S. 137 (1953), the Court reiterated the rule that the scope of habeas corpus has always been narrower in military cases than when a prisoner is in civil custody. That case permitted review of a court-martial conviction for claimed violations of constitutional due process where the military justice system had failed to fully consider such claims. Except for constitutional violations, however, relief is proper only if the military had no jurisdiction to take the action complained of.

Lack of jurisdiction to review requests for administrative discharge has similarly been well established. In *Orloff* v. *Willoughby*, 345 U. S. 83 (1953), the Court refused to review a military-duty assignment or to order a discharge on the ground that the petitioner there had been unlawfully treated, recognizing that military discretion is not subject to review in the courts. See also *Noyd* v. *McNamara*, 378 F. 2d 538 (CA10 1967) (refusal to order assignment to nonobjectionable duties or accept resignation of conscientious objector); *United States ex*

[4] 28 U. S. C. § 2241 (c) (3).
[5] 28 U. S. C. § 2241 (c) (1).

rel. Schonbrun v. *Commanding Officer*, 403 F. 2d 371 (CA2 1968) (no habeas corpus or mandamus jurisdiction to review denial of hardship discharge request); *Antonuk* v. *United States*, 445 F. 2d 592 (CA6 1971) (no jurisdiction to review promotions).

It is said that jurisdiction is established to review military exercise of administrative discretion where the promulgated procedures are not followed. Authority for this proposition is stated to be *Service* v. *Dulles*, 354 U. S. 363 (1957), and *Vitarelli* v. *Seaton*, 359 U. S. 535 (1959). Although the principles of those cases might not carry over undiminished to the military services,[6] some lower courts have assumed that they do.[7] Reviewing an administrative decision for conformity to regulations, however, would afford no relief to petitioner in this case. If his application for discharge was processed as required by DOD Directive 1300.6 the Army has fulfilled its responsibility regardless of whether its ultimate conclusion corresponds to the decision that a court of law would make. In this case the provisions of DOD Directive 1300.6 were applied to petitioner by Army Regulation 135–25. It requires submission of a form request by petitioner, subsequent interviews with a chaplain, medical officer, and an "O–3" hearing officer, consideration of the application by a board of recommendation, and finally action by petitioner's commanding officer. All these procedures were followed in petitioner's case. The Army acted within its jurisdiction in denying the request.

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[6] "[W]e cannot review the merits of appellant's present claim that the Air Force in the case at bar did not comply with its own regulations in regard to appellant. Such a claim must indeed be strained to contain an overtone of constitutional invalidity giving rise to immediate judicial review of its application." *Noyd* v. *McNamara*, 378 F. 2d 538, 540 (CA10 1967).

[7] *E. g.*, *Antonuk* v. *United States*, 445 F. 2d 592 (CA6 1971); *Smith* v. *Resor*, 406 F. 2d 141 (CA2 1969).

Habeas corpus will issue where a person is held in custody under color of federal authority, or in violation of the Constitution or laws of the United States. 28 U. S. C. §§ 2241 (c)(1) and (c)(3). There is no question that the Army had jurisdiction over petitioner at least to the limited extent discussed above in reference to the issue of custody. There is also no question that the Army is under no statutory command to discharge petitioner before the expiration of his contracted period of military service. Acting in accordance with its own procedures, it has chosen not to do so. For me, this ends the permissible scope of habeas corpus inquiry.

THE CHIEF JUSTICE, MR. JUSTICE BRENNAN, and MR. JUSTICE POWELL join Part I of this dissent and on that ground would affirm the judgment of the Court of Appeals.